THE SUPREME COURT
IN
THE INDIAN CONSTITUTION

BY

SRI RAM SHARMA

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THE SUPREME COURT
IN THE INDIAN CONSTITUTION

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INSTITUTE OF PUBLIC ADMINISTRATION, SHOLAPUR

THE SUPREME COURT
IN
THE INDIAN CONSTITUTION

BY
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SHOLAPUR

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FOREWORD

I HAVE READ with great interest the manuscript of Principal Sri Ram's book on the Supreme Court of India. He has tried to view the decisions of the Supreme Court of India with the critical eye with which Professor Willis and Professor Willoughby viewed the decisions of the Supreme Court of America in their standard works on the Constitution of U.S.A. Whether his work receives the same recognition among constitutional lawyers or students of the Constitution in India only time will decide. I cannot but congratulate him on his thorough and painstaking study, though I may not agree with some of his criticism or with the praise he has here and there lavished on the Court and its achievements in the short spell of its existence. Principal Sri Ram has shown great industry and understanding of the Court's work in writing his treatise on the Supreme Court and I am sure that the reading public will benefit a good deal by a perusal of his work. In the context of the democratic set up of our courts, this work is of immense importance; it contains a store of well digested and well organised information which can otherwise be found only scattered in Law Reports. For the parliamentarians and Constitution makers the book furnishes enough material for thought before they attempt any further amendment of the Constitution. I heartily commend to those interested in the working and future of the Constitution a study of this work.

MEHR CHAND MAHAJAN,
Chief Justice of India
(Retd.)

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PREFACE

A FINAL COURT of appeal was set up in India for the first time on 26 January 1950 to function as the guardian of the Constitution as well as of the rights of the Indian citizens and residents in the country. Though the Constitution largely drew upon the experience of the United States, in its organization and functions the Court also inherited the British traditions of functions of the judiciary as well as of its organization. The Indian Penal Code and Codes of Criminal and Civil Procedures, though works of British jurists, draw upon French experience. The rule of law was extended for the first time to what had till recently been the territories of the Indian princes where their word had been law. To top it all there are various strands of personal law and customary law peculiar to various groups and communities in the country.

The object of this study is to explain to the students of Indian Constitutional law and public administration what the Court has made of the Constitution under the circumstances mentioned above. In another way also the Supreme Court in India occupies a peculiar position. The constitution which it interprets can be amended in many matters more easily than that of any other federal government. For another thing the Constitution is more precise in many matters which come to the Court than most other constitutions. The judges of the Supreme Court in India, therefore, are expected to stick to the provisions of the Constitution more closely and thus refrain from exercising the power of judicial legislation on the scale on which such courts exercise it elsewhere. Under the circumstances, I venture to presume, that this study may prove of some use to the students of comparative government and comparative law as well.

Dr. Mehr Chand Mahajan, formerly Chief Justice of India, is largely responsible for the completion of a task which I lightheartedly assumed probably in a moment of self-delusion. He read the typescript of my preliminary survey, *the Supreme Court and Judicial Review in India* which was published in 1953. When some of its foreign reviewers suggested that I follow it up with a full length

study of the subject, he once again read through the first draft of the present work as its various chapters were taking shape. His valuable and penetrating comments and criticism encouraged me in carrying through the project. I am grateful to him for the Foreword which he has contributed to the work. Prof. Alan Gledhill of the London University read the proofs very carefully and made suggestions for the improvement of the book. I am grateful to him for the pains he took to point out various errors into which I would have otherwise fallen but for his expert help. Justice Nittoor Sreenivasa Rau of the Mysore High Court and Justice Amar Nath Grover of the Punjab High Court similarly helped me greatly by their comments and criticism for which I owe them thanks. None of them, however, is responsible for the views expressed in the book.

Part of the material published here appeared in a slightly different form in the *Public Law*, London and the *All India Reporter, Nagpur*. I am grateful to the editors of both for their allowing me to air my views in their valuable pages.

I am grateful to the D. A. V. College Trust and Management Society, New Delhi, for its affording me all facilities for the carrying out of this project.

I owe a debt to the works included in the Bibliography. Even those that have not been cited in the text have helped me in various ways in the formulation of the views expressed in the following pages.

I am thankful to the University of Poona for a grant towards the expenses of publishing this book.

SRI RAM SHARMA.

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CHAPTER I

THE SUPREME COURT OF INDIA

The Supreme Court of India consists of a Chief Justice and ten associate justices. The Constitution limited the number to 'not more than seven', but gave Parliament power to prescribe a larger number.[1] Parliament raised the number to ten in 1956. Parliament cannot hope—as the Congress in the U.S.A. may hope for and has expected—for a change in the opinion of the Court on constitutional questions by increasing its membership. Only five judges form a quorum for a constitution bench. The Chief Justice may not assign the new justices to the constitution bench and may thus prevent any attempt by the executive to control the court in constitutional matters.

Judges are appointed by the President after consultation with such of the judges of the Supreme Court or of the High Courts in the States as the President may deem necessary. The Chief Justice of India is invariably consulted. The President's choice is limited to eminent jurists, judges of a High Court who have held that office for at least five years and High Court advocates of ten years' standing. So far the practice has been to make new appointments from among the judges or retired judges of the High Courts. Though the names are formally recommended to the President by the Home Minister, the recommendation of the Chief Justice of India plays the decisive part. Unlike the usual practice in the United States, no active politician has yet been appointed to the Supreme Court nor is it possible to discern any party patterns in the appointments made so far.

It is interesting to compare the Indian practice with what usually happens when appointments to the Supreme Court are made in the United States. The President has a free hand. Political considerations still play a primary part in the appointment of the judges. The presidential nominees have to be approved by the Senate. As the nomination of justice Brandeis proved, this may sometimes raise a political storm not only in the Senate but even

in legal circles throughout the country. Of 'the nine wise men' on the bench in 1953, only one was a republican. Five of the justices were members of the government when they were appointed.[2]

In Australia unless an appointment is made for life, judicial power of the commonwealth cannot be exercised by the appointee.[3] In the United States appointments are made for life though retirement at 70 is encouraged.[4] Life tenure was introduced in the British Act of Settlement in 1701 in order to secure the independence of judges. Since then it has continued to plague the Anglo-Saxon tradition. The Indian provision for retirement at 65 secures both the independence of the judges as well as efficiency in the work of the Court. We need not fear a repetition of the American experience where a judge of the Supreme Court in conference voted both ways and had to be asked to resign by his colleagues.[5] The Indian practice has, however, led to the very short tenure for the Chief Justice.

Unlike England, in India judiciary is a career service. A practising lawyer may leave the bar to become a session judge. Here the retirement age is fifty five. He may, however, hope to be raised to the High Court bench. Here the retirement age is 60. Once a judge of the High Court, he may hope for promotion to the bench of the Supreme Court where the retirement age is 65. This may leave room for party promotion. But no practising lawyer can become a session judge unless the High Court recommends him. Judges of the High Court are appointed on the recommendation of the Governor of the State, the Chief Justice of India and the Chief Justice of the High Court. The recommendation of the Governor is based on the advice of his Chief Minister. Judges of the Supreme Court are similarly appointed on the recommendation of the judges of the High Court and the Supreme Court. The decisive voice in both the cases is that of the Chief Justice of India, though occasionally a Chief Minister may insist on his nominee being appointed. Chances of party appointments to the Supreme Court are very rare as, once on the bench, a judge cannot take part in party politics. Except when the Court was expanded from seven to ten judges recently, it is seldom that more than a single judge is appointed in the course of a year. Though

judges retire at 65 the President may, if invited by the Chief Justice to do so, request a former judge of the Supreme Court to act as an *ad hoc* judge.

Unlike the practice in the United States, it is customary in India to raise the seniormost judge to the office of the Chief Justice of India whenever a vacancy occurs in the office. This has had a curious result. When appointed most of the Judges of the Supreme Court are in their late fifties if not in their sixties. Judges retire on completing their sixty fifth year. During the last seven years, two Chief Justices—Patanjali Shastri and Mehr Chand Mahajan—retired on reaching the statutory age. One died in harness and one resigned on account of ill health. We have now our fifth Chief Justice in the ninth year of the republic whereas the United States has its eighteenth Chief Justice in its 167th year.[6]

The Supreme Court was constituted in 1950 with six judges drawn from the Federal Court; Harilal J. Kania C. J. and Justices Syed Fazl Ali, Patanjali Sastri, Mehr Chand Mahajan, Bijan Kumar Mukherjee and Sudhi Ranjan Das. During the last eight years, sixteen new appointments have been made to fill in the vacancies as they occurred and to raise the total to eleven judges as decided recently. In eight years of its life 22 judges have served as justices of the Supreme Court in India as against 90 judges in 167 years in the Supreme Court of the United States. Of the original six who formed the Court in 1950, only Sudhi Ranjan Das, C. J. occupies the bench today. Justice Vivian Bose joined the Court in 1952 after having been the Chief Justice of the Nagpur High Court and retired in June 1956; Justice Ghulam Hasan, a retired judge of Allahabad High Court, also joined in 1952 and died in harness on 5th November 1954. Justice Chandrasekhar Aiyar, a retired judge of the Madras High Court, joined the Supreme Court in September 1950 and retired in 1953. In his retirement he served as an *ad hoc* Judge of the Supreme Court in 1955 and again in 1956. Justice Bhagwati of the High Court of Bombay joined the Supreme Court in September 1952. Justice Jagannadh Das, Chief Justice of the High Court of Orissa, joined the Court in March 1953; Justice Venkatarama Aiyar in January 1954; Justice B. P. Sinha, Chief Justice of Nagpur High Court, in December 1954; and Justice

Jafar Imam, Chief Justice of Patna High Court in February, Justice S. K. Das in April, and Justice Govind Menon in September, 1956. On the expansion of the Court in 1956, Justices Jiwan Lal Kapur, Gajendragadkar and Amrit Lal Sarkar were elevated to the Supreme Court bench.

Some have deplored the short tenure of office of our judges. Drawn as they are from the High Courts, this is inevitable. It has been suggested that this state of things may be bettered by drawing young blood from the bar or the Universities. It is an open question how many of our law teachers in the Universities would qualify as eminent jurists for being appointed to the Court. It is questionable whether young lawyers—really young at that—can bring to the Supreme Court any freshness of approach which would be mature enough to be of use at the Supreme Court bench. It is doubtful if the infusion of young blood would have so transformed the Supreme Court during the last eight years as to make it serve its purpose any the better. Younger appointments from the bar may import into the appointments to the Supreme Court political considerations and the remedy may thus prove worse than the disease. The present fluidity is likely to prove useful rather than otherwise to the Court.

The fluidity of the Court may usually restrict the personal element in the judgements of the Supreme Court but, may also make such an element conspicuous in rare cases. As the Chief Justice creates the benches and assigns cases to them, he may seem, while doing so, occasionally to effect the decision of a case inadvertently. But this would make little difference in the law declared by the Court. The practice so far has been that where the Court is called upon to interpret afresh any constitutional or statutory provision, almost the entire Court participates in the process. As described below,[7] when the Court reversed itself in Bengal Immunity Company's case or when it was called upon to resolve an alleged conflict between its earlier decisions, seven of the eight judges heard both the cases.

Theoretically a judge of the Supreme Court may be removed from office for 'proved misbehaviour or incapacity' if a majority of the members of each house of the Indian legislature comprising

not less than two third of the members present and voting, agree in presenting an address to the President for his removal.[8] So little is this provision likely to be used that, though authorized to do so, Parliament has made no law for the investigation and 'proving' of such misbehaviour or incapacity so far.

Unlike the Supreme Court in the United States, the Supreme Court in India sits in benches. Two benches of three judges for ordinary work or a bench of five judges for constitutional cases and another of three judges for other work could work simultaneously when the Court had eight judges in all. Now that the number has increased to eleven, three benches are functioning simultaneously. The Chief Justice may constitute a bigger bench for either kind of work. Once all the eight judges formed a bench to hear a constitutional question. Twice at least, benches of seven judges were constituted when a previous opinion of the Court seemed to be in question.

The Supreme Court in India follows the practice of the English courts in hearing oral arguments in the open court. No written briefs are filed by the opposing counsels as is the practice in the United States and there is no time limit set for oral arguments. The justices may interrupt a counsel in order to ask a question and get a point cleared. The court may admit new evidence in the form of affidavits or other material when it considers this necessary.

Once a week the members of the various benches meet in conference to discuss the cases argued before them. When the bench is unanimous, the seniormost justice on the bench may assign the task of writing the judgment of the Court to any member of the bench. When there is a division, the decision of the Court may be announced either by the seniormost judge of the majority himself or by one of the justices forming the majority. When the Court is divided, there may be more than two opinions. Judges may agree as to the decision of the Court in a case, but may have different reasons for the results so reached. In such a case there may be one or more concurring opinions as well as several opinions in dissent. As explained below,[9] the dissenting opinions serve a very useful purpose; 'they may sometimes presage what the Court

may hold in the matter when the case is presented to the Court next in a slightly different form.'

Judges receive Rs 4,000 a month, equal to the salary of the Chief Justice of a High Court. The Chief Justice receives Rs 5,000. This compares very unfavourably with the salary, $35,000 which judges of the Supreme Court get in the United States or £ 16,000 which the Lord Chancellor gets in U. K. Lords of Appeal in Ordinary get £ 6,000 in England. A judge of the Supreme Court in the United States may retire at 70. If he has served as a federal judge for at least 10 years, he would continue drawing his full salary at retirement. [10]

The present scale of salaries must be raised considerably. One may concede that the Chief Justice of India need not be paid any more than the President of India. But to pay him half as much as the President gets is insufferable. The Chief Justice of India is the highest working public servant in India. His is not a light job, much less a sinecure. There is no reason therefore why the salary of the Chief Justice should not be immediately raised to at least Rs. 7,500 with at least Rs. 6,000 for the associate judges.

NOTES

1 Article 124 (2).

2 Schwartz, *American Constitutional Law*, 130 to 132. For the storm over the appointment of Justice Brandeis Cf. Harris, *The Advice and Consent of the Senate*. A vigorous defence of the American practice is offered in Edward McWhinney *Judicial Review in the English Speaking World* as well as in Justice Frankfurter, *Owen J. Roberts Memorial Lectures*, 1957.

3 Nicholas, *The Australian Constitution*, 255.

4 Zink, *A Survey of American Government*, 384.

5 Charles Fairman, *Bacon Lectures*, 479.

6 Justice Frankfurter in Owen J. Roberts Memorial Lectures, 1957 in Manchester Guardian Weekly for March 28, 1957. 13.

7 Cf. below, Chapter 13.

8 Article 124 (4) and (6).

Cf. Provisions in the Constitution of the U. S. A. where removal by impeachment is provided. Only one judge was so impeached but the impeachment failed. The Act of Settlement provides for the removal of the judges in the United Kingdom by an address to the Crown presented by both houses of Parliament.

9 Chapter 12.

10 Fairman, *American Constitutional Decisious*, 11.

CHAPTER II

JURISDICTION AND FUNCTIONS

THE Supreme Court in India is firmly lodged in the Constitution. The broad outlines of its composition have been laid down, its functions have been described in some detail.[1] In dealing with both, the founders of the Indian Constitution drew their inspiration from British as well as from American sources. Practical men of affairs that most of them were, they did not confine themselves to the letter of the law, certainly not to the provisions of the American Constitution. They followed the spirit rather than the letter, practices rather than provisions and modified them all by their own ideas of what the country needed.

Section 2 of article 3 of the Constitution of U. S. A. gives the Congress the power to take away from the Supreme Court the power to hear and decide an appeal involving the constitutionality of an Act of Congress. As the Supreme Court itself held, the Congress may include in a statute a provision that the Supreme Court shall not have appellate jurisdiction to consider its validity.[2] The jurisdiction of the High Court of Australia is defined by the Commonwealth Parliament, which has prescribed that no appeals lie to the High Court from the decisions of the Court of Claims or the Conciliation and Arbitration Courts.[3]

The Indian Constitution in its articles 32, 132, 133, 134 and 136 confers on the Supreme Court powers, including the power to interpret the Constitution and thereby pronounce upon the validity of statutes. This power Parliament cannot take away. Articles 134, 138, 139 and 140 confer on Parliament the right to extend the authority of the Supreme Court. It may empower any other court to enforce fundamental rights within its jurisdiction, but this does not oust the jurisdiction of the Supreme Court.

Though India is a federation, unlike the United States, its government is parliamentary. This allows many matters to be considered in Parliament in India, as in Canada and Australia, which 'in the United States become the stuff of law suits'. But unlike

Australia, Indian constitution provides for a federation which has mostly come into being by a unitary government transforming itself into a federal government by vesting sovereign authority in units which had not enjoyed such authority before.[4] It thus stands in a class by itself; parliamentary, federal, creating units by surrender of power by the centre rather than vice versa. All these characteristics are reflected in the place the Supreme Court occupies in the Constitution just as they are reflected in the Constitution itself. The creation of sovereign units by a sort of gift from the Central Government is probably as much responsible for the fact that India has one set of courts with the Supreme Court at their head as any other single factor.

The Supreme Court has not simply acquired the judicial functions which the English Privy Council exercised over all judicial courts outside England.[5] It has acquired powers of judicial control over all courts throughout India.[6] Its power extends to the territories and courts in the territories which till 1947 formed princely India. It has acquired almost the same judicial power over the High Courts in the various states which the High Courts enjoy over inferior courts in the areas they serve.[7] Any pretence of a separate set of courts in States has been conclusively destroyed by the fact that, as in Canada, the head of the Central Government, the President, appoints the Judges of the High Court rather than the Governor, the head of the State. The President also enjoys the right of transfering a judge from one court to another.[8] The Supreme Court has further been vested with the power to transfer any case—except a contempt of court case—from a court under one High Court to a court under another High Court.[9]

The exercise of judicial authority over the High Courts was further illustrated when the Supreme Court entertained an appeal by special leave against the decision of the Nagpur High Court in a contempt of court case. The High Court committed two lawyers for contempt of court for presenting an application for transfer of a case from one bench of the High Court to another, alleging that they were afraid they would not get a fair trial in the court that was hearing the case. The lawyers were convicted and sentenced. The Supreme Court in appeal upheld the conviction

for contempt but accepted the apology of the lawyers which the High Court had refused to consider sufficient.[9a]

In Sukhdeo Singh Sodhi v. The Chief Justice and the Judges of the Pepsu High Court though the Supreme Court declined to issue a writ to the High Court, it gave directions as to how a case of contempt should be heard and decided. It said in part, 'We hold, therefore, that the High Court can deal with matters of contempt summarily and adopt its own procedure. All that is necessary is that the procedure is fair and that the contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself.

'We wish however to add that though we have no power to order a transfer in an original petition of this kind, we consider it desirable on general principles of justice that a judge who has been personally attacked should not, as far as possible, hear a contempt matter which, to that extent, concerns him personally. It is otherwise when the attack is not directed against him personally. We do not lay down any general rule because there may be cases where that is impossible; as for example in a court where there is only one judge or two and both are attacked. Other cases may also arise where it is more convenient and proper for the judge to deal with the matter himself as for example in a contempt *in facie curioe*.

'All we can say is that this must be left to the good sense of the judges themselves who, we are confident will comport themselves with that dispassionate dignity and decorum which befits their high office and will bear in mind the oft quoted maxim that justice must not only be done but be seen to be done by all concerned, and most particularly by an accused person who should always be given, as far as that is humanly possible, a feeling of confidence that he will receive a fair, just and impartial trial by judges who have no personal interest or concern in his case.' [10]

Another example of the exercise of this power can be seen in the claim of the Supreme Court to interfere in the exercise of discretion vested in High Courts under article 134, to grant a certificate that a case is a fit one for appeal to the Supreme Court. It quashed an order of Allahabad High Court granting such a certificate to an

applicant when that Court thought—erroneously—that it had no discretion to refuse the certificate.[11] Similarly when the Calcutta High Court granted a certificate on a question of fact because, 'there has not been as full and fair a trial as ought to have been held', the Supreme Court declared that 'the certificate granted was no certificate at all and does not avail the appellant before us.'[12]

Another extension of power comes by implication. Before 26th January 1950, the Indian High Courts could not exercise any supervisory powers over the revenue courts, nor did they—such of them as enjoyed original jurisdiction—have any original jurisdiction in any matter concerning the revenue courts or concerning any act, ordered or done in the collection of the revenue. The Constitution has brought even the revenue courts under the supervisory control of the High Courts and vested original jurisdiction in revenue matters in such High Courts as enjoy original jurisdiction.[13] As the Supreme Court can entertain appeals against all decisions, judgments or determinations of the High Courts, its powers now extend to revenue matters and are thus to that extent greater than those of the Privy Council.

Article 226 confers on the High Court the power to issue directions, orders or writs for any purpose to any person or authority including any government. This power is wider than that conferred on the Supreme Court by article 32 which authorizes it to issue direction, order or writs for the enforcement of fundamental rights only. But as any decision, judgment, decree or determination of a High Court may be brought up in appeal to the Supreme Court, either upon a certificate of the High Court or by grant by the Supreme Court of leave to appeal, causes dealt with by the High Court under article 226 may be heard in appeal by the Supreme Court.[14]

The Supreme Court is thus a court of appeal with greater powers than those which were exercised by the Privy Council; its authority is also immensely greater than that of the Supreme Court in the United States. As we have seen already, India has only a single set of courts. There are no separate State offences nor separate State courts. We have no federal immunities or guarantees. Article 141 provides that the law declared by the Supreme Court

shall be binding on all courts within the territory of India. Article 144 calls upon all authorities, civil and judicial, to act in aid of the Supreme Court. Thus the Supreme Court in India has no such rivals, as has the Supreme Court in the United States in the Supreme Courts of individual states. Its decisions cover federal and state laws alike. Its order must be obeyed, so the Constitution itself declares, by all authorities, civil and judicial. In Australia the appeals from the States' Supreme Courts lie not to the Federal High Court but to the Privy Council where there is a clash between the legislations passed by Parliament and state legislatures or where the constitutionality of a State law is in question.[15]

The Supreme Court of India is called upon to exercise another very important function which was not vested in the Supreme Court in the United States nor in the highest courts set up in Australia, Canada or South Africa. The inclusion of Fundamental Rights in Part III of the Constitution led to a vast increase in the power of the Supreme Court. Again article 13 (1) lays down that 'all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.' Clause (3) of article 13 makes the task of the Supreme Court embrace in this connection an examination of 'ordinances, orders, bye-laws, rules, regulations, notifications, customs or usage having the force of law.' The Supreme Court may in a case in court, be called upon to examine any variety of law thus understood if it is claimed, rightly or wrongly, that it infringes the fundamental rights of a citizen. The Constitution of the United States set up a new organ which started legislating at about the same time as the Supreme Court of the United States was set up. The Supreme Court thus had no call to examine any previous legislation with a view to finding out whether it squared well with the principles which the Constitution had enunciated. But a substantial part of the work of the Supreme Court in India has consisted in pronouncing upon the constitutionality or otherwise of laws passed under different conditions by all sorts of authorities —a resolution (never notified) of a council of ministers in a princely state,[16] or notification by a Chief Commissioner delegating his own

delegated law-making authority to a subordinate.[17] Besides considering Acts of the legislatures and delegated legislation, it may be called upon today to determine the exact meaning of various types of rights in land which may have been, purposely and deliberately, loosely defined when created more than 200 years ago.[18] It may have to examine custom when under attack, in order to decide its exact form when, in its origin, it may have been beautifully vague.[19] The Supreme Court may have to listen to endless arguments about a usage going back several centuries and recorded by officials who did not understand it.[20]

The Constitution of India, unlike that of the United States or Australia, provides not only for the setting up of a new federal government, it also lays down the constitution of its various units. As the entire Constitution is subject to review by the Supreme Court, the powers of the Supreme Court of India in constitutional matters range over a vastly wider field. It may be called upon to pronounce on the constitutionality of legislation passed not only by the federal legislature but also by the law making bodies in all the sixteen units of the Indian federation today. Till 1 November 1956 it had to watch over even a larger number of legislative streams.[21]

It must also be remembered that the Indian Constitution provides for the canvassability of the constitutionality of a law only twice, in a State High Court or in the Supreme Court. Whenever a question involving a substantial question of law as to the interpretation of the Constitution becomes one of the issues in a case in any court, the court must at once proceed to find the interpretation of the provision given either by the Supreme Court or by the High Court under which the court is situated. If it finds the necessary interpretation, it must apply that to the case in court. If the provision has not yet been interpreted, the Court is to remit the case at once to the High Court for its decision on the point of constitutional law.[22] Thus, though constitutionality of a law, federal or state, may be raised anywhere, the impugned Act can be declared unconstitutional in a lower court only if the court holds that the Act is in conflict with the provisions of the Constitution as interpreted by the Supreme Court or the High Court. Naturally,

though this provision makes for the speedier disposal of cases in lower courts, it denies to the Supreme Court in India the help which the American Court enjoys usually from at least two earlier arguments as to the constitutionality of any impugned Act.

In another way, the Supreme Court in India shoulders a heavier burden than that borne by the Supreme Court in the United States. Except where the right of appeal from the highest state court, a Court of Appeals or a District Court has been specifically granted, the Supreme Court in the United States has enjoyed since 1925 full discretion in deciding which cases it will admit for arguments in Court.[23] It has thus become 'a court of special resort for the settlement of such questions as it deems involve a substantial public concern, rather than the concern only of private persons as such.'[24] The Indian Constitution lays down that certain causes must be heard in the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. Article 131 defines the original jurisdiction of the Supreme Court. Articles 132, 133 and 134 declare that an appeal *shall* lie to the Supreme Court under circumstances specified in the three articles. As if this is not enough, article 136 gives to the Court the right to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter, of any court or tribunal in the territory of India. The Court may exercise restraint in granting special leave. Very heavy burden of work may compel it to deny special leave to appeal as frequently as it might otherwise have been pursuaded to grant. The Supreme Court has held that the right to an appeal, at least in a civil case, is acquired as soon as a case is filed.[25] It is not conceivable therefore that it would shirk its duty where an appeal lies to it. Nor can it refuse to hear cases raised under article 32.

The Supreme Court has another duty laid upon it. It may be asked to render an advisory opinion on questions referred to it by the President.[26] So far it has been asked to do so twice, in the Delhi State Laws case and about the Kerala State Education Bill.

Certain accidents of its creation vested in the Supreme Court the right to decide a group of other cases. It succeeded to the

jurisdiction of the Federal Court and therefore all suits, appeals and proceedings pending in the Federal Court at the commencement of the Constitution stood, under article 364(2), removed to the Supreme Court for its decision.[27] Certain princely states had Privy Councils, e.g. Hyderabad and Jammu and Kashmir. The decision of all appeals and other proceedings pending before such Privy Councils at the commencement of the Constitution were also transferred to the Supreme Court to be disposed of by it. Two special benches were created, one at Hyderabad and another at Srinagar to dispose of such cases.[28]

The Supreme Court functions as an election tribunal under article 71 to decide all doubts and disputes arising out of the election of the President or the Vice-President.

Article 317 vests in the Supreme Court the power to hold an enquiry into the alleged misbehaviour of a member of a Public Service Commission if asked by the President to do so.

The Supreme Court of South Africa has an appellate division, consisting of at least eleven judges. The validity of Acts of Parliament amending Sections 35 and 137 of the South Africa Act may be questioned here when the quorum is eleven judges as against five judges in ordinary appeals. The validity of any Provincial Acts may also be challenged here and the judgments of the appellate division are binding on all courts in the Union. An action may be brought against the Crown in the Supreme Court. This may include a claim for damages and a declaratory suit concerning rights. A refund of the money paid to the governmcnt may be asked for or an interdict claimed.[29] The Supreme Court of Canada is a general court of final appeal. It exercises original jurisdiction to issue writs of habeas corpus. It may render an advisory opinion when called upon to do so by the Governor-General. It sits in appeal on advisory opinions given by the High Courts of the several provinces of Canada. The validity of the Canadian provincial statutes may be questioned here. But 'the power of the courts to declare laws ultra vires has never been as important in Canada as in the United States'.[30]

The High Court of Australia is a general final court of appeal both in matters federal and local. It may grant an injunction, a

writ of prohibition or a writ of mandamus against any officer (including a judicial officer) of the federal government. It exercises original jurisdiction in suits between a citizen of a State against another State or against the Commonwealth. The High Court also possesses the power of invalidating a State law where the ground has already been covered by a federal statute or when a federal statute is subsequently enacted. In a roundabout way the Australian High Court may be called upon to render an advisory opinion even on a bill before the legislature. [31]

It would thus be seen that the Constitution of India entrusts to the Supreme Court the performance of tasks much more extensive than those entrusted to a Supreme Court in any other Constitution. The highest courts in the Commonwealth countries do not have to safeguard any fundamental rights as none such rights have been included in their constitutions. They do not all have the right to pronounce upon all the laws passed by their legislatures. It discharges wider functions of judicial review of legislation than those discharged by the Supreme Court in the United States which may pronounce law unconstitutional or void when incompatible with the Constitution of the United States alone. The circumscribed right of the Supreme Court in U.S.A. to pronounce on the validity of the State legislation is limited in various ways. [32] We have also seen that in considering 'law in force' the Supreme Court in India has another formidable group of laws to examine and pronounce upon.

The Supreme Court in India, however, has in some ways an easier work to perform. As Prof. Freund points out, 'India is striving for an enhanced rule of law where the substance of our Bill of Rights provisions is spelled out in greater detail and subjected to the guarantee of judicial review.' 'It attempts to envisage some of the problems we stumbled over.' 'It reserves the right of reasonable legislation in national security and so forth.' [33] Two facts have to be taken into account in dealing with jurisdiction of the Supreme Court in India with regards to Fundamental Rights. As explained elsewhere, [34] rights are seldom absolutely guaranteed. The absolutely guaranteed rights in the Constitution of the United States are subject to an unspecified police power of the

state, as the judges of the Supreme Court in the United States may hold. The Supreme Court in India has its task made easier by a detailed description of the rights in the Constitution which also lays down when the rights could be restricted. Debates on fundamentals which seem to occupy the judges in the United States seldom occur in the Supreme Court in India.

The Indian Constitution, for example, specifically guarantees the right to form associations and unions.[85] It also subjects this right to reasonable restrictions in the interest of public. This specification both of the right as well as of the limits thereon saves the Court from the hard work necessary in the United States, either when the right of association is sought to be established or the restraints on it are sought to be justified in the name of the police power.

Very wisely the framers of the Indian Constitution refrained from putting a due process clause in the Constitution. Justice Frankfurter suggests that this was done 'after a thorough consideration of the judicial history of due process in the United States', particularly by the Constitutional Adviser to the Constituent Assembly, Sir B. N. Rao.[86] The Constitution of India thus guarantees trial according to procedure established by law and thus relieved the Supreme Court of the tremendous amount of work which its prototype in the United States created for itself in interpreting the process of due law. Of course, the procedure established by law has had to be interpreted. The Supreme Court has held that such procedure must be according to a valid law. Occasionally the Supreme Court has fallen back upon the notion of a natural law. It has, however, usually tried to confine its researches to what may be described as a fair and reasonable procedure prevailing generally in the country outside the impugned procedure.

It has been suggested that the more rigid the Constitution, the more flexible becomes its interpretation by the judiciary. The rigidity of the American Constitution and the difficulty of amending it seems to have placed the task of making this instrument of government serve the varying needs of the times on the shoulders of the Supreme Court in the United States. Amending the Indian Constitution is not however as difficult.[87] If the interpretation of the Constitution at any time seems not to serve the life of the nation

but to thwart its fulfillment, the Constitution may be amended. If it transpires that the Constitution makers have not been able to express themselves as well as they should, an amendment may make the meaning clear. In either case, the Supreme Court is not left to struggle along as best as it may under the existing circumstances. The Indian Judges so far have not been kept in doubt for long by the Constitution makers as to what they aimed at achieving.

The Supreme Court in India so far has also been spared some of those amusing experience which its counterpart in the United States has had to suffer. A State in the United States once passed a law threatening to hang anyone if he attempted to enforce a decision of the Supreme Court.[38] On another occasion, President Jackson is said to have challenged Chief Justice Marshall to enforce the decision of the Court if he could.[39] The State courts have not infrequently thwarted the Supreme Court in making its view of the law prevail throughout the country. The recent decision of the Supreme Court holding segregation in schools unconstitutional[40] is still being fought out in courts, in the legislatures and by the executive in some of the States in the south today. The Supreme Court in India has been spared all such strife by the fact that its authority stands firmly lodged in the Constitution. It has not therefore had to face the tremendous task of so shaping its decision as to make them operative either with 'deliberate speed' or with 'majestic instancy' so as to avoid obstruction, if not worse.

The work of the Supreme Court may be divided in two classes. As an appellate court, it may have to interpret law including in the term besides statutes, 'any ordinance, order, by-law, rule, regulation, notification, custom or usage, having in the territory of India, the force of law![41] To this should also be added the personal laws of various communities inhabiting the country, Hindus, Muslims, Parsis, Christians, Sikhs and others. This is a formidable task. In performing it, the Supreme Court may be asked today whether an endowment by a Hindu widow for religious rights at the place where her husband was cremated is sanctioned by Hindu religious texts.[42] Tomorrow it may have to pronounce upon the principles underlying succession to property among Devadasis in Malabar[43] or Brahmins in the Gurdaspur District in Punjab.[44] Now it may have

to define the course of police investigation which it will hold valid. A little later it may be pronouncing upon the very intricate and delicate question of the consequential results of an alleged conversion of a person to a religion or denomination. In the same term, an order in appeal against an Election Tribunal may be followed by another reversing or upholding the decision of an Industrial Appellate Tribunal. One order may define when the right of appeal becomes vested in a party in a civil suit, another may lay down the procedure in appeals from the orders of the Registrar of Trade Marks. It may be overruling a High Court now in a case which it decides on its own or setting it aright even when it followed the law as laid down by a superior tribunal, the Privy Council. It may be expounding the law with regard to tax on incomes, now for the benefit of the Central Board of Revenue and a little later in the interest of the citizens. It may have to decide the function which one contracting party undertook to perform for another when both cannot agree. Nice points of mercantile law about the precise nature of a business may engage its attention. Protection of the rights of the public servants may lay a claim to its time.

No cause is too small for its enquiry. It has had to decide whether a judgment agreed to by two judges of the High Court but signed only by one—because the other died before signing it—is a valid judgment.[45] In another case, it had to decide the result of the death of an evacuee to Pakistan on the property which during his life time could have been declared evacuee property.[46]

The Supreme Court sits in judgment upon the decisions and orders of courts and tribunals. This includes industrial dispute tribunals[47] and conciliation boards, election tribunals,[48] labour appellate tribunals,[49] Registrar of Patents and Trade Marks,[50] collectors of customs,[51] provincial stamp authorities,[52] revenue boards[53] or other revenue authorities.[54] Some cases from the tribunals might reach the Supreme Court direct, others may find their way through the High Courts. Again some may come straight,[55] others on the strength of a certificate from the High Courts,[56] still others may have been admitted by special leave, granted by the Court.[57]

An appeal in criminal cases lies from a High Court to the Supreme Court if the High Court reverses the sentences of acquittal passed on the accused and sentences him to death.[58] Other criminal cases and civil cases may reach the Supreme Court on a High Court's certifying that the case is a fit one for appeal to the Supreme Court[59] or that it involves a substantial question of law as to the interpretation of the Constitution.[60] The special leave to appeal against the decision of a High Court has usually been granted in cases where grave miscarriage of justice was claimed.[61]

Appeals from tribunals have been entertained mostly under article 136 vesting in the Supreme Court the right to grant special leave to appeal. In Dhakeshwari Cotton Mills Ltd., v. Commissioner of Income Tax, West Bengal the Supreme Court said in part, 'it is not possible to define with any precision the limitation on the exercise of this discretionary jurisdiction. It being an exceptional and overriding power, it has to be exercised sparingly and with caution and only in special and extraordinary situations. The power can be only used to advance the cause of justice or when a person has been dealt with arbitrarily or a tribunal has not given fair deal to a litigant. It is the duty of this Court to see that injustice is not perpetuated or prepertrated by decisions of tribunals'.[62] The Court of review 'may allow a review on three specified grounds (1) discovery of new and important material evidence which, after exercise of due diligence, was not within the applicant's knowledge or could not be produced by him when the decree was passed (ii) mistake or error apparent on the face of the record, (iii) for any other sufficient reason (a reason sufficient for grounds like i or ii'.[63] The Supreme Court has confined itself in such cases to interfering in their decisions when such tribunals made wrong assumptions of Constitutional law or interpreted statutory law wrongly or were themselves faulty in their composition. Their decisions have been reviewed also for faulty procedure adopted by the tribunals or authorities. The Supreme Court 'does not sit as a court of further appeal on facts and does not interfere with findings given on a consideration of the evidence unless they are perverse or based on no evidence'.[64] Occasionally the Supreme Court has upset a question of fact wrongly determined by the tribunals. It declared

that it would not interfere in the decision of a tribunal when it had reason to believe that 'a tribunal of reasonable and unbiassed men could judicially reach' the conclusion appealed against, 'unless it is shown that exceptional circumstances exist, that substantial and grave injustice has been done and the case in question presents features of sufficient gravity to warrant a review of the decision, this Court does not exercise its overriding power.' [65]

The Supreme Court has held that when it grants a petition for leave to appeal, the appellant must confine himself to the grounds of appeal set forth in his petition. 'The grant of leave does not entitle the appellant to open out the whole case and contest all the findings of the case and raise every point which could not be raised' in the tribunal or the court below. [66]

The Supreme Court may grant special leave to appeal from the decisions of the High Courts. It declared in part that such 'an occasion for interference may arise when a High Court acts perversely or otherwise improperly or when it is deceived by fraud.' [67] The Supreme Court would interfere when in substance there has not been a fair or proper trial as, for example, when witnesses necessary to the unfolding of the narrative of the prosecution are not called or when police diaries are used by the judges. [68] In another case it declared that it would interfere when there is some glaring error which has resulted in a substantial miscarriage of justice. [69] When an appeal has been admitted by special leave, it does not entitle the appellant to open out the whole case and contest all the finding of facts and raise every point which could be raised in the High Court. 'At the final hearing only those points can be urged which were urged when the appeal is asked for.' [70] But the Supreme Court 'may allow an appellant in such an application to attack the decision of the court below on grounds other than those on which the leave to appeal was granted.' Occasionally, however, the Supreme Court, though holding that the arguments advanced 'do not warrant interference by us in the decision of the courts below', may still examine the arguments independently.

When a case comes to the Supreme Court with a certificate from a High Court, 'it is always open to an appellant to support

the certificate on grounds other than those on which it has been actually ordered to be given.[71] Article 132(3) allows a party which has secured a certificate to appeal to the Supreme Court on any other ground, if the Supreme Court so permits.

In Nar Singh and Another v. Utter Pradesh, the Supreme Court went into the question whether the conditions for the grant of a certificate had been satisfied even though the High Court had granted a certificate. The Supreme Court conceded that the grant of a certificate is within 'the discretion of the High Court', but it held that it is a judicial discretion.[72] 'If on the face of the order, it appears that the court has misdirected itself and considered that its discretion was fettered when it was not or that it had none, the Supreme Court must either remit the case or exercise the discretion itself.' It held that in the present case the certificate was wrongly granted because in the matter of granting a certificate 'a case' meant the case of a single individual.[73]

The Supreme Court has original jurisdiction as a Court of record to punish for contempt of itself.[74]

Article 131 vests in the Supreme Court the power to decide cases between the various governments in India. The power to decide such disputes is vested in the highest courts in the land in federal States. In the United States, during the first sixty years of the Court, the only state disputes coming to the Supreme Court were boundary disputes and disputes about the use of waterways. Suits by the United States against states have arisen usually in the period after 1889. These concern mostly paramount rights over submerged lands on the coast. The Indian Constitution provides for settlement of boundary disputes between States by other means culminating in an Act of Parliament.[75] Disputes about waterways may be decided by administrative action following upon the report of a Water-way Disputes Council set up under an Act of Parliament. Disputes about the ownership of and paramount rights over submerged lands on the coast of India may not arise here, as all such rights are vested in the federal government by the Constitution.[76]

Other types of cases between states, such as have arisen in the United States, do not seem to be likely in India partly because of the more precise division of functions between the federal govern-

ment and governments of the States.[77] Similarly controversies between citizens of different States do not arise here as the Indian Constitution recognizes only one citizenship,[78]

Under article 32, appropriate proceedings for the enforcement of the fundamental rights may be commenced in the Supreme Court. The Supreme Court may issue writs, directions or other orders for the enforcement of any of the fundamental rights. 'The makers of the Constitution having decided to provide certain basic safeguards for the people, which they call fundamental rights, evidently thought it necessary to provide a quick and inexpensive remedy for the enforcement of such rights and finding that prerogative writs which the courts in England have developed and used whenever urgent necessity demanded immediate and decisive interposition were peculiarly suited for the purpose, they confered the power to issue such writs on the Supreme Court.' 'The language used in article 32 is very wide, and the powers of the Supreme Court extend to issuing of orders, directions or wrist including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for the enforcement of fundamental rights.' [79]

The Supreme Court can make an order or issue a 'writ in the nature of certiorari in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulates the exercise of jurisdiction in the matter of granting such writs in English law.'

'One of the fundamenal principles in regard to the issuing of writs of certiorari is that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression judicial acts includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons, obliged to exercise such functions.'

'An essential feature of the writ certiorari is that the control which is exercised through it is not in an appellate but supervisory capacity. The superior court does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous, the offending

order or proceedings, so to say, is put out of the way as one which should not be used to the detriment of any person'.[80] 'The supervision of the superior courts exercised through the writ of certiorari goes on two points. One is the area of inferior jurisdiction and qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise.'

'Certiorari may lie and is generally granted when a court (or tribunal) has acted in excess of its jurisdiction or without jurisdiction. The want of jurisdiction may arise from the nature of the subject matter of the proceedings or from the absence of some preliminary proceedings or the court itself may be illegally constituted or may suffer from certain disability by reason of extraneous circumstances. When the jurisdiction of the court depends upon the existence of some collateral fact, the court cannot, by a wrong decision of fact, give itself jurisdiction which it would not otherwise possess.

'A tribunal may be competent to enter upon an enquiry but in making an enquiry it may act in flagrant disregard of the rules of procedure or, where no particular procedure is prescribed, in flagrant violation of rules of natural justice. A writ of certiorari may be available in such cases.' The question on which there has been some controversy is whether a writ can be issued when the decision of the inferior court is wrong in law. 'When a tribunal made a speaking order and the reasons given in that order in support of the decision were bad in law, certiorari could be granted.[81] In Regina v. Medical Appeal Tribunal, Ex-parte Gilmore, it was held that the Court has always had power to order an inferior tribunal to complete the record.[82]

An error in the decision or determination apparent on the face of the record—e.g. based on clear ignorance or disregard of the law —may also be amenable to a writ of certiorari. What is an error apparent on the face of the record must be left to be determined judicially on the facts of the case.'

This may import an element of subjectivity and therefore of chance in such proceedings. 'An error that might be considered by one judge as self-evident might not be so considered by another.' The writ may be granted on the application of an aggrieved party

alone. It has been suggested that it will issue only 'if substantial injustice' to the aggrieved party is established.[83]

In the State of Bombay v. United Motors it was held that where a party came to the Court with an allegation that his fundamental right had been infringed and sought relief, the Court may issue a prerogative writ even if adequate alternate remedy was available. 'The reasons for issuing a writ became all the stronger if the alternative remedy was onerous and burdensome.' 'In this case before the applicant could claim a remedy elsewhere, he had to deposit the entire amount of the tax which could hardly be described as an adequate remedy.'[84]

'The writ does not lie in order to bring up an order or decision for the rehearing of the issues raised in the original hearing.' 'A mere wrong decision' cannot be corrected by certiorari. In Parry & Co. Ltd. v. Commercial Employees Association the Supreme Court held that the High Court of Madras had wrongly granted certiorari where it was not available.[85]

The writ of prohibition has for its object the restraining of inferior courts from exceeding their jurisdiction and can be issued not merely to courts but to all authorities exercising judicial or quasi judicial authority. 'When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior court for a writ of prohibition and on that an order will issue. It may happen that in a proceeding before a court a decision might have been passed which does not completely dispose of the matter. In such cases it is open to the Court to stop further proceedings which are consequential to the decision. Broadly speaking a writ of prohibition will bar the proceedings to any extent pending'.[86]

Two other proceedings are now being increasingly used in English courts to control the discretion of administrative authorities, injunction and declaratory of judgment. Actions for injunctions can be brought by a citizen on his own but an action for a declaration can only be proceeded with if the Attorney-General consents to be a party.[87] The Indian Constitution gives the Supreme Court the right to issue appropriate directions and orders where infring-

ment of fundamental rights is alleged to have taken place. The complainant may come straight to the Court. He does not need the intercession of the Attorney-General as a complainant does when he applies for a declaration in England.

The Supreme Court may issue a writ of mandamus to administrative or judicial authorities in a case regarding fundamental rights. By sitting in appeal on the decision of a High Court, it may supervise and judicially control the issue of such a writ by a High Court for any other purpose. The writ lies to compel a person, to carry out, according to law, a ministerial duty he owes to the applicant individually or, in appropriate cases, in common with other citizens if such authority or person has refused, when requested to do so by the applicant, to carry out such a duty. It is issued only if no other equally convenient or effective remedy is otherwise available. Though the duty owed must be ministerial and not judicial, it has been held that the courts owe a ministerial duty to decide a case and to carry it into effect. It may be issued even when a duty has been performed if the Court is of opinion that the performance is not according to law. A decision based on extraneous considerations, or on wrong view of the law or arrived at by a grossly unfair procedure may be held to be no determination at all.[88] The Court may in such cases indicate the correct view of law and ask the person or an authority to carry out its duties within the narrow limits thus laid down.

It is a discretionary remedy and the Court may refuse to grant the writ if it is of opinion that its grant would be infructious or the Court may not be able to supervise the due execution of its order. It may not grant it if its order would either embarrass the government in the discharge of its more essential duties or be otherwise contrary to public interest.

The writ of habeas corpus can be applied for by anyone on behalf of a citizen alleged to be wrongfully detained by the authority of the state. It is directed to the person in whose custody the person is alleged to be ordering him to produce the detained person in court on a day named in the writ along with any authority that the jailer may have for detaining him. The court examines the authority produced for detention and if it finds that it is not

sufficient, or that the prisoner is wrongfully detained, it may order that he be set at liberty. In Ex parte Thomas,[89] it was held that a habeas corpus petition can be made for the purpose of obtaining bail in England.

The application for a writ may be made either to the High Court having territorial jurisdiction in the matter or to the Supreme Court. As in the United States, the Court issuing the original order disposes of the case in Court. On failing to get an order in the High Court, the applicant may apply again to the Supreme Court for a writ. The writ can be applied for only twice successively in the same case, once in the High Court and then in the Supreme Court. In the United Kingdom and the United States judges of the High Court and the Supreme Court entertain such applications in their individual official capacity and an aggrieved person may go on applying from one judge to another.

Occasionally this judicial challenge to the detaining authority may itself result in the release of a prisoner. The Court examines the validity of detention as at the time the prisoner is produced before it. Sometimes the executive thus challenged may decide that the original order is not likely to survive judicial scrutiny and may therefore pass, before the case comes up for hearing, another order which in its opinion may serve its purpose better. The Court may thus be prevented from examining and pronouncing upon the original order as made and can offer no remedy for such illegal detention through this process.[90] It should, however, be remembered that the law allows other remedies for unlawful detention to a person when he is set at large whereas the writ of habeas corpus is only intended to secure his release from detention.

The writ of quo warranto is intended for challenging the validity of an official appointment. It may sometimes be issued when asked for by a citizen who may claim an interest qua citizen in having the appointment lawfully made or it may only be granted to a citizen who claims special injury caused by the wrongful appointment. The Supreme Court was only once approached for a writ of quo warranto. This application also called for the issuance of other writs as well and the case was decided without the Court's having to say anything about the quo warranto.

It has become the practice of applicants to make an omnibus prayer to the Supreme Court asking not only for a specific writ but for an appropriate order as well. Sometimes the writ may not even be specified. The Supreme Court has wide discretion in framing its determination in the matter and has not felt itself bound by formal requirements of such writs to any particular writ or order.

NOTES

1 Part V, Chapter IV Constitution of India (Union Judiciary in the Constitution of India).

2 Ex-Parte McCradle, 71 Wall, 506. The case was pending in the Supreme Court when the Congress passed an Act that the constitutionality of the impugned legislation (Reconstruction Acts) could not be adjudicated upon by the Supreme Court.

3 R. v. Murrary, 22, C.L.R., 437.

4 Cf. Sharma, *Constitutional History of India.*

5 Anson, *Law and Customs of the Constitution* Vol. II, Part II, pp. 323 to 326.

6 Articles 131 to 145, 226.

7 Articles 227. The story is told of a judge of a High Court complaining that the Supreme Court now treats the High Courts just as the High Courts treat the Session Judges. A judge of the Supreme Court promptly retorted that the decisions of the High Courts deserve no higher respect.

8 Article 222.

9 The Code of Criminal Procedure (Amendment) Act, 1952.

9a Shareef M. Y. and Another v. the Chief Justice and the Judges of the High Court of Nagpur and others 1955 1 S.C.R. 757.

10 Sukhdeo Singh Sodhi v. the Chief Justice and Judges of the Pepsu High Court 1954, S.C.R. 454.

Cf. Cook v. United States, 267 U.S. 517, Chief Justice Taft declared in this case decided in 1925; 'Where conditions do not make it impracticable and where the delay may not injure public and private rights, a judge called upon to act in a case of contempt by personal attack upon him, may without flinching from his duty, properly ask that one of his fellow justices take his place."

11 Nar Singh and Others v. State of U.P., 1955 1 S.C.R. 238.

12 1956 S.C.R. 639, Haripada Dey v. State of West Bengal and another.

13 Article 136.

14 Articles 133, 134 and 136.

15 Cf. Nicholas, *The Australian Constitution,* Griswold, *Government under Law,* Wheare, *Statute of Westminster,* Jenning, *Laws of the Commonwealth.*

16 Jaipur Opium Act, 1951. Harla v. State of Rajasthan, 1952 S.C.R. 110.

17 Cf. Captain Ganapati Singhji v. The State of Ajmer and Another, 1955 1 S.C.R. 1065.

18 Thakur Amar Singhji v. State of Rajasthan, 1955, 2, S.C.R. 303.

19 Saraswati Ammal v. Jagadambal and Another, 1953, S.C.R. 939.

20 Harihar Prashad Singh and Another v. Mst. wife of Munshi Nath Prashad and Others, 1956 S.C.R. 1.

21 Originally India had 27 States.

22 The Codes of Civil and Criminal Procedure (Amendment) Act 1951.

23 28 U. S. Code 1257. An appeal lies to the Supreme Court from a decision of the highest state court denying the validity of a treaty or statute of the United States. When a state statute is attacked as being repugnent to the constitution, treaties or statutes of the United States, an appeal from the decision of the highest state court lies to the Supreme Court if the State statute is sustained. Cf. Mayers, *The American Legal System*, pp. 18 ff; 323 ff., Fairman, *American Constitutional Decisions*, pp. 4 to 9, Potter, *The American Government and Politics*, 250.

The Court of claims or a Court of Appeals may certify a question for 'binding instructions' from the Supreme Court.

Most of the cases come to the Supreme Court by applications for the writ certiorari. Usually about 1500 such applications are made every year, About 235 of them may be admitted and only about 170 fully heard. The Supreme Court Rule 38 explains the method of selection:

'A review or writ will be granted only where there are special and important reasons therefor. The following (generally) indicate the character of the reasons which will be considered:—

(*a*) Where a State Court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court.

(*b*) Where a court of appeal has rendered a decision in conflict with the decision of another court of appeals or has decided an important question of local law in a way probably in conflict with applicable local decisions or has decided a federal question in a way probably in conflict with applicable decisions of the court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision'.

24 *American Constitutional Law*—Schwartz, 139.

25 Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh and others 1953, S.C.R. 987.

26 Article 135. Cf. Laskin, *Canadian Constitutional Law*, 98 to 104.

27 Article 364 (2)—Constitution of India. It is interesting to record that a case that had been partly heard in the Federal Court was dropped from its list by the Supreme Court because another article of the Constitution prevented it from entertaining it.

28 The Hyderabad bench consisted of Mr. Justice Mehr Chand Mahajan and two judges of the High Court of Hyderabad appointed as *ad hoc* judges to form the bench. The bench thus constituted, it is submitted, could not have functioned as a bench of the Supreme Court because the appointment of the *ad hoc* judges was not in accordance with the provisions of article 127(1). *Ad hoc* judges can only be appointed

when a quorum of the judges of the Supreme Court to hold or continue any session of the Court is not available. Such a quorum was available though there were not enough judges to form an additional bench at Hyderabad. The article does not authorize the creation of an additional bench ab initio made up of a Supreme Court judge and *ad hoc* judges. Cf. *The Indian Political Scene* by Sri Rama Sharma.

29 Cf. *The Constitution of South Africa* by May. Cf. *Government under Law*, Address by A. Van De. S. Centlioss, Chief Justice of South Africa, pp. 423 to 449.

30 Dawson, *The Government of Canada*, 85. Cf. Laskin, (Editor) *Canadian Constitutional Law*, pp. 450 to 492.

31 Cf. Nicholas, *Australian Constitution*—Chapter on Judiciary.

32 *The United States Code*, Judiciary and Judicial Procedure Sections, 1254, 1257.

33 Prof. Freund in *Government Under Law*, 356.

34 See below.

35 Article 19(1) (c).

36 Justice Frankfurter in *Government Under Law*, 24, Compare the discussion on the interpretation of Due Process in *Government under Law, and the Supreme Court and the Supreme Law*. Cf. Foreign influences on Indian Constitution by Sir B. N. Rao in '*The Hindu*,' Madras of January 21, 1958. Justice Frankfurter considered that the power of the judicial review implied in 'due process' clause was not only undemocratic but also threw unfair burden on the Judiciary.'

37 Article 21; Cf. Sharma, *Supreme Court and Judicial Review in India*, pp. 38 to 43 for various methods of amending the Constitution of India.

38 Cushman, '*Leading Constitutional Decisions*', p. 263.

39 *The Supreme Court and the Supreme Law*, 116.
Cf. however, Warren, *The Supreme Court in the United States History*, II, 22, 66.

40 347: U.S. 483 (1954).

41 Articles 13 (3) (a).

42 Saraswati Ammal and Another v. Rajagopal and Another, 1954, S.C.R. 277.

43 Saraswati Ammal v. Jagadambal and another, 1953, S.C.R. 939.

44 Mahant Salig Ram v. Mst. Maya Devi, 1955 1 S.C.R. 1191.

45 Surendra Singh v. State of U.P., 1954 S.C.R. 330.

46 Ebrahim Aboobaker v. Tek Chand, 1953, S.C.R. 691.

47 Minerva Mills Ltd. v. Workers, 1954 S.C.R. 465.

48 Dinabandhu Sahu v. Jadumoni Mangraj, 1955 1 S.C.R. 140.

49 i) Muir Mills Co. Ltd. v. Suti Mills Mazdoor Union Kanpur, 1955, 1 S.C.R. 991.
ii) Automobile Products of India Ltd. v. Rukmaji Bala and others, 1955, 1 S.C.R. 1241

50 The Registrar of Trade Marks v. Ashok Chandra Rakhit Ltd., 1955 2 S.C.R. 252.

51 Maqbool Hussian v. The State of Bombay, 1953, S.C.R. 730.

52 State of Bombay and Another v. The United Motors (India) Ltd., and Others, 1953, S.C.R. 1069.

53 Chief Controlling Revenue Authority v. Maharashtra Sugar Mills Ltd.; 1950 S.C.R. 536

54 The Member Board of Revenue v. Arthur Paul Benthall 1955, 2 S.C.R. 842.

55 Article 131.

56 Articles 132 (i), 133, 134 (i) (C).

57 Article 132 (2).

58 Article 134 (1) (a).

59 Articles 133 (1) (C).

60 Article 132 (2).

61 Article 136 (1).

62 Dhakeshwari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal, 1955, 1 S.C.R. 941.

63 Moran Mar Basselios Catholicos and Another v. The Most Rev. Mar Poulose Athanasius, 1955, 1 S.C.R. 520.

64 Dinabandhu Sahu v. Jadumoni Mangraj & others, 1955 I.S.C.R. 144.

64 Cf. also Liquidators of Pursa Ltd. v. Income-Tax Commissioner, Bihar, 1954 S.C R. 776.

65 Jamuna Prashad Mukherji v. Lacchi Ram, 1955 1 S.C.R. 608.

66 Article, 136.

67 Hemraj v. State of Ajmer, 1954, S.C.R. 1133.

68 Habeeb Mohammad v. The State of Hyderabad, 1954 S.C.R. 475.

69 Jamuna Prashad Mukherji v. Lacchi Ram, 1955, 1 S.C.R. 608.

70 Hemraj v. State of Ajmer, 1954, S.C.R. 1133.

71 Deputy Commissioner, Hardoi v. Ram Krishan Narain and others, 1954 S.C.R. 506.

72 Nar Singh and Another v. State of Uttar Pradesh, 1955, 1 S.C.R. 238.

73 Ibid. 241.

74 Article 129.

75 State Reorganisation Act, 1956 and Articles 2 and 3 Constitution of India.

76 Item 57 and 97 in the list of Union subjects in the seventh schedule of the Constitution of India.

77 Schedule VII, Constitution of India.

78 Article 10 Constitution of India.

79 T. C. Bassappa V. T. Nagappa 1955, 1 S.C.R. 256.

80 cf- R. v. Campbell Ex parte, Nomikos (1956), W.L.R. 622 and Regina v. Patent Appeal Tribunal Ex parte, Champion Paper and Fibre Co., (1957) W.L.R. 248.

81 Cf. Hart, *American Administrative Law*, Robson, *Justice & Administrative Law*, Schwartz, *American Administrative Law*.

i) Veerappa Pillai v. Raman and Raman Ltd. 1952 S.C.R. 583.

ii) T. C. Basappa v. T. Nagappa and another, 1955, 1 S.C.R. 250.

iii) Hari Vishnu Kamat v. Syed Ahmad Ishaque, 1955, 1 S.C.R. 1104.

iv) Ebrahim Aboobaker v. Custodian General of Evacuee Property, 1952 S.C.R. 696.

82 1957, 2 W.L.R. 498.

83 Sangram Singh v. Election Tribunal, Kotah, 1955, 2, S.C.R. 1.

84 State of Bombay v. United Motors (India) Ltd., 1953 S.C.R., 1069.

85 Parry & Co. Ltd. v. Commercial Employees' Association, 1952 S.C.R. 519.

86 H. V. Kamath v. Syed Ahmed Ishaque and Others, 1955-1 S.C.R. 1117 Cf. Nicholas 269 for Australian Practice, Ridge, *English Constitutional Laws* for English practice.

87 Ridge, 289.

88 Cf. Hart. *American Administrative Law,* Nicholas, 289, Dawson, *Government of Canada*, Ridge, 288, Vice-Chancellor, Utkal University v. S.K. Ghosh, 1954, S.C.R. 885.

89 (1956) Crim. L.R. 119

90 Naranjan Singh Nathawan v. The State of Punjab, 1952, S.C.R. 395.

APPENDIX

SUPREME COURT CAUSE LIST

For Monday, October 28, 1957

Court No. 1:—Before the Chief Justice, Mr. Justice T. L. Venkatarama Aiyar, Mr. Justice S. K. Das, Mr. Justice A. K. Sarkar, Mr. Justice Vivian Bose.

HABEAS CORPUS PETITIONS FOR FINAL HEARING!

Petition No. 126 of 1957: Leo Roy Frey. vs. The Superintendent, District Jail, Amritsar.

Petition No. 127 of 1957: Thomas Dana v. The Superintendent, District Jail, Amritsar.

MISCELLANEOUS MATTERS.

C.M.P. No. 1157 of 1957: Gopal Mills Co., Ltd., Ahmedabad and Another vs. The Union of India and another. (Application for directions).

C.A. No. 267 of 1956: Gordhan Singh vs. State of Rajasthan and Others. (For orders on abatement).

C.A. No. 400 of 1957: Kunj Kishori vs. L. N. Gupta and Others. (For Withdrawal).

C.M.P. No. 1108 of 1957: The Commercial Tax Officer and Others. vs. M/s. Mahadayal Premchandra. (Application for modification of the Order of the Court dated 19—12—55 granting stay).

C.M.P. No. 885 of 1957: Abdul Hai and Another. vs. The Custodian General of India and others. (Application for stay by Notice of Motion).

C.M.P. No. 883 of 1956: Laxman Purshotam Pimputkar, vs. The State of Bombay and Others. (Application for leave to proceed in 'forma pauperis').

Cr. M.P. No. 391 of 1957; Mohd. Dastagir vs. State of Madras. (Application for directions).

PETITIONS FOR SPECIAL LEAVE TO APPEAL (CIVIL).

No. 502 of 1957: Bihar Working Journalists Union vs. The Bihar Journals Ltd., Patna and others. (With application for ex-parte Stay).

No. 481 of 1957: Ram Singh vs. The State of Bombay and Others.

C.M.P. Nos. 1009 and 1010 of 1957: (Applications for Stay by Notice of Motion).

No. 374 of 1957: Smt. Miro vs. Manohar Lal and Others.

No. 473 of 1957: A. N. D. Silva vs. Union of India.

Criminal

No. 431 of 1957: Ramnath Khemka vs. The State of Bihar.

Before Hon'ble Chief Justice Hon'ble Mr. Justice S. K. Das, and the Hon'ble Mr. Justice A. K. Sarkar.

Part heard C. A. No. 297/56: Workmen of Dimakuchi Tea Estate vs. Dimakuchi Tea Estate.

Court No. 2

Before Mr. Justice N. H. Bhagwati, Mr. Justice B. P. Sinha, Mr. Justice P. B. Gajendragadkar.

C.M.P. No. 1055 of 1957: Moran Mar Basselios Catholicos. vs. Thukalan Paulo Avira of Pulyattu and Another. (Application by Respondent No. 1 for modification of Court's Order dated 22—4—1957.)

Before Mr. Justice N. H. Bhagwati, Mr. Justice Syed Jafer Imam, Mr. Justice P. B. Gajendragadkar.

APPLICATIONS FOR EX-PARTE STAY.

C.M.P. No. 1168 of 1957: K. Kamaraja Nadar vs. A. Kunju Thevar and Others.

C.M.P. Nos. 1124-1126 of 1957: The Pioneer Motors (Private) Ltd., Nagercoil, etc. vs. The Municipal Council, Nagercoil.

Petition for Special Leave to Appeal (Crl.) No. 477 of 1957: Manphool Singh and Others. vs. The State of Punjab. (With application for condonation of delay).

PETITIONS FOR SPECIAL LEAVE TO APPEAL (CIVIL).

No. 108 of 1957: Mahant Ram Nath Gir vs. Ram Iqbal Pandey.

No. 402 of 1957: The Commissioner of Income-Tax, Bombay.

No. 419 of 1957: The Commissioner of Income-Tax vs. Dhangadhra Chemical Works Ltd.

No. 434 of 1957: Brooke Bond India (Private) Ltd. vs. Shri S. P. Joshi and Another. (With application for 'ex-parte' Stay).

No. 489 of 1957; M/s. North India Light Weight Steels (Private) Ltd. vs. Kapur Chand, Fitter. (With Application for Stay by Notice of Motion).

No. 493 of 1957; Delhi Cloth and General Mills Co. Ltd. vs. Shri Ram Rattan.

Nos. 497 and 498 of 1957: Parsram Parumal vs. Shri Ashtabhuja Prasad, I.T.O., Calcutta and the Commissioner of Income-Tax, Calcutta. (With application for condonation of delay in filing Special Leave Petition No. 497 of 1957).

No. 426 of 1257: Nirmal Das Chela Sant Saran Das vs. Narsing Das Chela Bhawan Das.

No. 501 of 1957: Mansata Film Distributors vs. Sohrab Merwanji Modi.

No. 522 of 1957: M/s. Chandmal Jiwanmal vs. M/s. Devidayal (Sales) Private Ltd. (With application for 'ex-parte' Stay).

No. 526 of 1957: M/s. Burn and Co., Ltd. vs. Their Employees (With application for 'ex-parte' Stay).

APPLICATIONS FOR STAY BY NOTICE OF MOTION.

C.M.P. No. 871 of 1957: Moulvi S. A. Rasool vs. The Additional Custodian of Evacuee Property, Hyderabad (Dn.)

C.M.P. No. 882 of 1957: Kesheoprasad vs. Popatlal and Others.

C.M.P. Nos. 888, 889 and 1154 of 1957: Gordhan Das and Another vs. Gulab Chand. (Applications for Stay by Notice of Motion and for Consolidation of Appeals).

C.M.P. No. 896 of 1957: R. Rama Reddiar vs. The State Transport Appellate Tribunal, Madras and Another.

C.M.P. No. 937 of 1957: Sheth Anandji Kalyanji Pedhi vs. Industrial Tribunal, Rajkot and Another.

C.M.P. No. 1073 of 1957: M/s. Brooke Bond (India) Private Ltd., Allahabad. vs. Its Workmen.

SUMMONS FOR NON-PROSECUTION.

In the matter of Petition for Special Leave to Appeal (Civil) No. 225 of 1957: Shyam Lal and Another vs. Seth Takhatmal and Another.

Court No. 3

Before Mr. Justice B. P. Sinha, and Mr. Justice J. L. Kapur.

FOR JUDGMENT:

Cr. A. No. 165 of 1957: Suraj Rai and Others vs. State of Bihar.

FOR HEARING:

Transfer Petition No. 12 of 1957: Shri G. X. Francis and Others vs. Sardar Banke Bihari Singh and Another. (With application for Stay by Notice of Motion).

PETITIONS FOR SPECIAL LEAVE TO APPEAL (CRIMINAL).

No. 459 of 1957: Palla Singh vs. The State of Rajasthan.

No. 479 of 1957: Jacob at the rate of Yakub Eaziekel Naigaonkar vs. The State of Bombay.

No. 502 of 1957: Kunj Behari Singh vs. The State of U.P.

No. 462 of 1957: Jorawar Singh vs. The State of Madhya Pradesh.

No. 394 of 1957: Mithai Kurmi and others vs. The State of Uttar Pradesh, (With Application for Bail—for Orders on default of surrender information in respect of Nos. 4 and 6 only).

No. 428 of 1957: Gurdip Singh vs. The State of Uttar Pradesh.

No. 440 of 1957: Ram Parkash vs. Jai Parkash and Another.

No. 452 of 1957: The State of Bihar vs. Prabhakar Sharma.

Nos. 463 and 464 of 1957: The State of Bombay vs. Walaiti Lal Kohli.

No. 485 of 1957: Sikandarbeg vs. The State of Bombay.

No. 489 of 1957: Narayan vs. The State of Bombay.

No. 501 of 1957: Indrajit vs. The State of Uttar Pradesh.

No. 511 of 1957: V. S. Thanickachalam vs. The State of Madras.

PETITIONS FOR SPECIAL LEAVE TO APPEAL (CIVIL).

No. 76 of 1956: Parmeshwar Chaudhry and Others vs. Ram Kirpal Pandey and Others. (With application for condonation of delay).

No. 361 of 1957: Mst. Shahrukh Jahan Begum. vs. Syed Inayat Husain Khan and Others.

No. 387 of 1957: Ram Saran Lal and Others vs. Mosomat Domnikuer and Others.

No. 470 of 1957: Smt. Kisanibai vs. Khushalrao and Others.

No. 478 of 1957: H. Hongappa and Another vs. The Mahadeva Sastry and Others.

No. 505 of 1957: Shri B. N. Chaturvedi vs. The Allahabad Bank Ltd. (With application for condonation of delay).

SUPREME COURT: CAUSE LIST

For October 24 and 25.

Court No. 1:—(Before the Chief Justice, Mr. Justice S. K. Das and Mr. Justice A. K. Sarkar.

Banwarilal vs. Amritsagar Gupta and Others.

Workmen of Dimakuchi Tea Estate vs. Dimakuchi Tea Estate.

British India Elect. Construction Co. Ltd., vs. Their Workmen.

Workmen of Assam Co., Ltd. vs. The Management of Assam Co. Ltd.

Perumal Chetty and Another vs. Satagopan.

Sathappa Chettiar vs. Ramanathan Chettiar.

Management of Itakuli Tea Estate vs. Their Workmen.

Court No. 2:—(Before Mr. Justice N. H. Bhagwati, Mr. Justice Syed Jafer Imam and Mr. Justice P. B. Gajendragadkar).

State of U.P. vs. Swadeshi Cotton Mills Co. Ltd. and Others and Kamalapat Motilal Sugar Mills and Another. (With application for transposition).

Ganesh Flour Mills vs. Their Workmen. (With application for urging additional grounds in C.A. 364/56). (October 24, 1957).

Chaubey Jagdish Prasad vs. Ganga Prasad Chaturvedi (October 29, 1957).

Balakrishna Santram Pujari and Others vs. Sree Dyaneshwar Maharaj Sansthan (October 31, 1957).

G. P. Sonawala and Another vs. Eastern Cotton Co. (4th week).

Patna Electric Supply Co. vs. Bali Raj and Another.

Patna Electric Supply Co. vs. Adhir Ghose.

Court No. 3:—(Before Mr. Justice B. P. Sinha and Mr. Justice J. L. Kapoor).

For Judgment:—Sidheshwar Ganguli vs. State of West Bengal.

Anil Prakash Lahiri and Another. vs. State of West Bengal and Another.

(Before Mr. Justice B. P. Sinha, Mr. Justice J. L. Kapur and Mr. Justice Vivian Bose).

Wasi Aktar vs. State of Bihar.

Mukut Behari Lal vs. State of Uttar Pradesh.

(NOT BEFORE OCTOBER 25, 1957);—

State of Mysore vs. Banoor Irappa and Others.

Nanigopal Biswas vs. The Municipality of Howrah.

Bishnupada Naskar vs. State of West Bengal.

Surendra Bahadur Singh vs. State of U.P.

Ram Lakshman vs. State of U.P.

CHAPTER III

INTERPRETING THE CONSTITUTION AND THE LAW

(1)

In performing its various functions, the Supreme Court exercises the right of judicial review of legislation. This gives it the right to pass on the constitutionality and validity of statutes passed by Parliament or State legislatures, including subordinate and ancilliary legislation as well. Such power over national legislation first came to be exercised by a court when in Marbury v. Madison, Chief Justice Marshall claimed it for the Supreme Court in the U.S.A. "Marbury v. Madison introduced an unending colloquy between the Supreme Court and the people of the United States in which the Court continually asserts, 'You live under a Constitution, but the Constitution is what we say it is,' and the people incessantly reply, 'As long as your version of the Constitution enables us to live with pride in what we consider a free and just society, you may continue exercising this august, awesome, and altogether revocable authority".[1] Since then several democratic countries with written Constitution have invested their highest court with this power. Technically it means that the courts will decline to enforce or apply a statute which they regard as unconstitutional. It has been claimed that when an Act is challenged as being unconstitutional, the Supreme Court has only the duty 'to lay the article of Constitution which is invoked beside the statute which is challenged and to decide whether the latter squared with the former.[2] 'All the Court does, can do, is to announce its considered judgment upon the question whether the legislation is in accordance with or in contravention of the Constitution.[3] Justice Stone in the same case urged that 'the language, even of a Constitution, may mean what it says.' In actual practice, judicial review may mean much more and much less than that. For one thing, in the United States 'when one comes close to the actual process of constitutional adjudication the text of the Constitution seems ordinarily to be of little help'. 'On the ultimate problems the Constitution speaks with delphie

reticence.' 'Many of the cases submitted to the Supreme Court', it has been said, 'are quite insoluble in terms of law or formal logic. They are matters of accounting, questions of the probable economic effects of legislation'.[4] 'Judicial Review is always more than pure and simple enforcement of the Constitution; in addition it always comprises express or tacit interpretation of Constitution.'[5] Thus exercised, the judicial function is merely that of 'fixing the outside border of reasonable legislative power beyond which it cannot go without violating the prohibitions of the Constitution or crossing the ground of its grant.' Even here the work is more complex than it sounds. 'Having regard to the great, complex, ever-unfolding exigencies of Government much that will seem unconstitutional to one man, or body of men, may reasonably not seem so to another' . . . 'The Constitution often admits of different interpretations. There is often a range of choice and judgment . . . in such cases the Constitution does not impose upon the legislature anyone specific opinion but leaves open this range of choice, and whatever choice is rational is constitutional.[6]' As the Privy council said in 1936, 'it is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the import of the meaning.[6a]

'The ultimate question', Professor Thayer asserted as far back as 1893, 'is not what is the true meaning of the Constitution, but whether legislation is sustainable or not' . . . 'In dealing with legislative action a court cannot always, and for the purposes of all sorts of questions, say that there is but one right and permissible way of construing the question.[7]' As Justice Garrison put it in Attorney-General v. McGuiness, 'the ultimate question is whether the Constitution permits the court to disregard the Act'.[8] Thus 'when the judges hold an act constitutional, the strict meaning of their words is this; not unconstitutional beyond reasonable doubt.'[9]

It should be remembered that judicial review as practised in the United States limits the Supreme Court 'to pass on the validity of legislation involved in cases and controversies actually before it in relation to a higher law deemed to be binding on both the Court and the legislature'. The Supreme Court thus has to interpret both the law involved in the case as well as the relevant provisions of the Constitution. As a result of 'declaring a law void on its

face' the legislature may be forced to pass narrower statutes limited to constitutional objective. In the United States it may also lead to a State court's interpreting a statute, too indefinite at the time the defendant acted, so as to make it sufficiently precise to warrant his conviction.' In Law v. New Jersey the Supreme Court held this wrong and quashed the conviction based on such a 'convenient interpretation'.[10]

It has been claimed that 'no other country gives so much authority to its superior judiciary'[11] as the United States does. This makes the 'justices run the danger of going arrogant on us. Indeed it is the judicial occupational disease.'[12] One remedy may seem to be provided by the rigour with which the justices sometimes controvert the opinion advanced by their colleagues on the bench. Prof. Freund would have us believe that in the United States 'almost every justice of the Supreme Court over the generations has had occasion to lament that so grave and delicate a responsibility was entrusted to so incompetent a group as his colleagues.'[13]

As another safeguard against the danger of going arrogant, the Supreme Court in the United States early imposed limits to the exercise of its power of judicial review.

Concrete real issues, presented in the actual cases are requisite for the adjudication of constitutional questions.[14]

The Court will not pass upon the constitutionality of legislation

(*a*) in a friendly, non adversary proceedings

(*b*) on the complaint of one who has availed himself of its benefits and

(*c*) on the complaint of one who fails to show that *he* is injured by its operation.[15]

In contesting the validity of a statute, the issue must be raised by one adversely affected and the interest must be of a personal as contrasted with official interest. 'Litigants may challenge the constitutionality of a statute only in so far as it affects them.'[16] A litigant must have a substantial interest in the case or controversy raised.[17] A state can intervene as *parent patriate* 'on behalf of the economic welfare of its citizens, for example, against discriminatory

rates set by an alleged illegal combination of carriers[18] or to assert its quasi-sovereign right over wild life within its domain[19] or to protect its citizens against noxious discharge of gases by an industrial plant in an adjacent state.'[20]

The Court will not decide abstract, hypothetical or contingent questions.[21] 'Nor will it determine moot cases or collusive suits.'[22] This does not however bar declaratory judgment in cases 'of definite and concrete controversy touching the legal relations of parties having adverse legal interests of sufficient immediacy and reality.'[23]

2. 'The Court will not anticipate the question of constitutionality in advance of the necessity of deciding it.'[24]

(*a*) 'The Court will not pass upon a constitutional question if there is also present some other ground upon which the case may be decided.

(*b*) The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'[25]

3. When the validity of an Act is drawn in question, 'it is a cardinal principle that this court will construe the statute so as to bring it within the law of the Constitution.'[26] To these may be added some self denying ordinances which the Supreme Court usually follows:—

1. One who relies upon the invalidity of a statute has the burden of proving its invalidity.[27]

2. 'If the end which the legislature seeks to accomplish be one to which its power extends and if the means employed to that end, although not the wisest or the best, are yet not plainly and palpably unauthorized by law, the Court cannot interfere.'[27a] Justice Roberts would go even further. 'With the wisdom of the policy adopted, the courts are both incompetent and unauthorised to deal'.[28] 'The Court is not concerned with the motives of the legislatures nor with the concurrence of the legislation with natural justice, fundamental principles of government or spirit of the Constitution'. Justice Rich expressed a similar opinion in the High Court of Australia when, in the Airway case, he declared that 'this court is not in the smallest degree concerned whether such a project is politically, economically or socially desirable or undesirable. It is

concerned mainly with the question whether it is within the constitutional powers of the Commonwealth Parliament to pass on Act or for the regulation-making authority to make a regulation of the type which has been called in question'.[29]

3. 'The Court will not pass on a 'political' question, a question final determination of which has been entrusted by the Constitution to the discretion of the legislature or executive departments. The way in which they use this is not open to review by the Court'.[30]

4. 'In cases involving statutes portions of which are valid and the portions invalid the courts will separate the valid from the invalid and throw only the latter unless the portions are inextricably connected'.[31]

5. The Court will declare no legislation void unless a majority of its full membership so concurs.

In Abitibi Pulp and Paper Co. v. Montreel Trust the Privy Council in 1943 enunciated some principles which it would apply in discharging its power of judicial review of legislation, mainly in distribution of powers between the dominion and the provinces.

'1. Possibility of abuse cannot be taken into account in determining the ambit of legislative power.

'2. The Court must have cojent reasons before it, arising from the nature of the impugned legislation, before it can impute to provincial legislation some object other than what is to be seen on the face of the enactment.

'3. In determining the scheme of distribution of powers ordinary meaning must be restricted

(*a*) to avoid overlapping,

(*b*) to avoid conflict between parliament and legislatures,

(*c*) to avoid parliament's absorbing some of the powers of the provinces and

(*d*) to escape one head's swallowing another.

'4. Powers assigned to the dominion and the provinces must be read together, the language of each interpreted in the light of what is found in the other.

'5. General grant of power to the dominion or the provinces must give way to special and specific grant to the other.

'6. When the proper construction of terms used in the Constitution Act to define the legislative power is doubtful, the interpretation put upon it by dominion Parliament in its actual legislation may properly be considered. But the declarations of dominion parliament are not of course conclusive.

'7. History may sometimes be resorted to for the purpose of determining disputes as to the interpretation to be placed on the language employed in the Constitution or the Acts of the legislature Parliament'.[32]

In examining validity of statutes in Canadian cases it has been customary to examine not the words of the Statute only but its true nature and character, its true purpose, its scope and effect—its pith and substance. 'The doctrine saves incidental encroachments of a legislative field if only the law is, in pith and substance within the legislative field of the particular legislature which made it.[32a]. It is not enough to be content with what the law apparently seeks to effect. Its true legal effect is to be examined and it has to be established whether or not the legal effect of the statute establishes the real purpose of the law. A subject may have a double aspect and serve various purposes. In one aspect and for one purpose it may fall within the dominion list and for another within the provincial list. Where dominion and provincial powers overlap, if the field occupied by the statute is clearly within the sphere permitted to the enacting legislature, it is intra vires. If the field is not clear, the dominion statute prevails. All legislation necessarily incidental or ancillary to the exercise of powers conferred upon the dominion or the provinces is intra vires. In an emergency created by war or special conditions, local matters may attain national dimensions and may therefore be diverted to the dominion control if they concern the peace, order and good government of the dominion as a whole. A statute may be partially invalid. 'If the invalid part is so clearly separable from the rest, that when it is deleted, there still remains a complete and self executing statute which the legislature might reasonably wish to have left in operation, the Court may hold void only the invalid section'.[33]

In Australia however those who maintain the authority of the

Commonwealth Parliament to pass a law are required 'to be able to point out to some enumerated power containing the requisite authority. But where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitations or restrictions on the power to indicate that in the Constitution'.[34]

In James v. The Commonwealth, Lord Wright held that the true test (of the powers granted in the Constitution) must be the actual language used.' Evidence of extraneous facts existing when the Commonwealth of Australia Act was passed in 1900, may, in cases of division of powers and constitutional guarantee, be held to throw light on the intention of the framers of the Constitution. But Lord Wright insisted, 'that intention can in truth be ascertained only from the language used'.[35]

The Australian courts have held that 'the courts may complement the grant of powers but not supplement it'.[36]

Thus laws which are necessary and proper, incidental to the execution of powers granted in the Constitution, may be held valid. It is possible that the legislature may exercise the power which it does possess for the purpose of assisting or carrying out a policy which may effect matters which are not directly within its legislative power. In Melbourne Corporation v. The Commonwealth[37] such exercise was upheld. The American courts have held that the defence power was wide enough to enable the Congress to control domestic affairs in times of war.[38] In Australia, it has been held that if a statute refers to the report of a Committee or Committees or Cabinet-memorandum or a resolution of a public party or of a public meeting or an article in a newspaper, the intentions of Parliament as expressed in the statute may be modified or controlled in a court, otherwise reports of speeches in Parliament are irrelevant and inadmissible. 'Neither the validity nor the interpretation of a statute passed by Parliament can be allowed to depend upon what members, whether ministers or not, choose to say. Possibly the case may be different if the bona fides of parliament or of the Crown in Parliament can be or is challenged'.[39]

When the Privy Council started interpreting the Constitution

of Canada, it started by asserting that the North America Act was a statute and must be interpreted like other statutes. This produced the rather curious result that the Constitution came to mean, as Prof. Kennedy asserts, something far removed from what the statesmen framing it had tried to write into it.[40]

In India the Supreme Court has not kept up the myth prevalent in the U.S.A. that when the Supreme Court decides a case holding a law invalid, its decision is confined to that case alone. Statutory law invites the lower courts to follow its interpretation of the Constitution, the Constitution makes the law declared by it to be binding on all courts throughout India. Thus when a law or part of a law is declared invalid, the decision makes it impossible for such a law to be enforced thereafter. It becomes 'dead, inoperative, for all purposes everywhere.'

'Once a statute is declared void under article 13(1) or 13(2) by this court, that declaration has the force of law, and the statute so declared void is no longer law qua persons whose fundamental rights are thus infringed. In America there is no similar statutory provision. In this country once a law has been struck down as unconstitutional law by the Court, no notice can be taken of that law by any court. The court is not empowered to look at that part of the law which has been declared as valid. There is no onus resting on the accused person to prove that the law that has already been declared unconstitutional, is unconstitutional in that particular case as well. The court has to take notice only of what the law of the land is, and convict the accused only if he contravenes the law of the land'.

This raises two problems. The first is that of the effect of a part of a law being held invalid allowing the rest to stand. The court was sharply divided on this question when in Behram Khurshid Pesikaka v. State of Bombay it faced the question of the effect of its earlier decision holding part of Sections 12 and 13 of the Bombay Prohibition Act invalid. The Supreme Court had held earlier that the Bombay Government could not lawfully prohibit the use of medicines or toilet preparations containing alcohol, though it could prohibit the use of spirituous drinks. This raised the question of determining whether an accused had 'consumed' prohibited

liquor or permissive medicine. The main issue became whether the onus of proving that the accused had taken prohibited liquor lay on the prosecution, or whether it was for the defence to plead that the accused had not committed the crime as he had consumed the permissive medicine only. One group of judges suggested that the result of the court's holding medicines out of reach of the Act was that it added a proviso to the section that those who used the medicines containing alcohol would not be punished. They held therefore that it was for the defence to establish that what the accused had done lay outside the ambit of the law. Another group held that the section stood amended *in fact* and only those could be punished who could be proved to have taken prohibited drinks and none other. 'The ambit of the section stands narrowed down so far as its enforceability against the citizens is concerned. No notice can be taken of the part of the section struck down. The offence of the contravention of the section can only be proved if it is established that they have consumed or used liquor which is prohibited by that part of the section which bas been declared valid.' [41]

There is then the problem of the effect of constitutional amendments on statutes held void. In Keshav Menon v. The State of Bombay the Court had held, after the American tradition, that a void statute was dead.[42] But it had to rethink the entire question when a constitutional amendment removed the virus of unconstitutionality from a statute in the particular matter, thus making it possible to hold that what was regarded unconstitutional previously, could be held constitutional now. There was no difficulty in applying the amended constitutional provision to post-amendment legislation. But the Supreme Court faced a knotty problem when it had to interpret a pre-Constitution statute that had been held void before the amendment. Was it void still? Another similar or almost similar statute not interpreted by the Court so far could not now be held void. It would look odd if, for the same defect, one statute was held void and another lawful. Further Parliament could so word the amendment as to make it retrospective in operation. In the case at bar it had not done so, but to hold the statute void now might invite parliament to make all its amendments retro-active. Under the circumstances the Supreme Court declared that the

amendment revived the dead Act from the moment it became effective. 'The true effect of Article 13(1) is to render an Act inconsistent with a fundamental right inoperative to the extent of the inconsistency. It is overshadowed by the fundamental right and remains dormant but is not dead. With the amendment made in clause (6) of Article 19 by the First Amendment Act, the provisions of the impugned Act were no longer inconsistent therewith and the result was that the impugned Act began to operate once again from the date of such amendment with this difference that, no rights and obligations could be founded on the provisions of the impugned Act from the date of the commencement of the 'Constitution till the date of the amendment.'[43] Here the Court seems to have followed the Australian practice in dealing with Commonwealth and State legislation in the concurrent field. In Carter v. Egg and Egg Pulp Marketing Board it was held that when concurrent powers are exercised, the law of the Commonwealth is supreme and the law of the State is invalid. But if the Commonwealth law were repealed the State law, would become operative.[44]

Article 13 declares all laws in force inconsistent with the fundamental rights granted in the Constitution invalid to the extent of their inconsistency. In Keshav Menon v. State of Bombay, the Court held unanimously that such laws become invalid from the date the Constitution came into effect. But it was divided on the question as to the effect of these laws in pending proceedings. The majority of the Court argued that 'if an act was done before the commencement of the Constitution in contravention of the provision of any law which, after the Constitution came into operation becomes void with respect to the exercise of fundamental rights, the inconsistent law is not wiped out; so far as past acts are concerned the law exists.'[45] The logical conclusion should have followed that it was permissible to launch proceedings against persons and citizens for such past acts. The Court however framed its ruling to make it no broader than the case in Court demanded and held only that 'proceedings pending at the commencement of the Constitution are not affected'.[46] Justices Fazl Ali and Mukherjee in dissent held that not only could no fresh proceedings for past acts be launched now under an Act held void, even pending cases

could not be proceeded with once the law had been held invalid and therefore inoperative.[47] Like the majority, they relied on the Interpretation Act, 1889 for their judgment. The majority relied on the substantive part of section 38 (2), which laid down that the repeal of an Act shall not effect any investigation, legal proceeding or remedy and any such investigation; legal proceeding or remedy may be instituted, continued or enforced .... as if the repealing Act had not been passed'. The minority relied on the exception provided for in the clause by the phrase 'unless contrary intention appears'. It sought to prove that the intention of the Constitution is to save even past acts from the pains and penalties of the laws declared void.[48] The majority rightly held that it was impossible to gather any such intention from the phraseology of the Constitution. Basu is wrong in criticizing this decision on the basis of common law practice in England.[49] All the cases cited by him relate to a period before the passage of the Interpretations of Laws Act by English Parliament in 1889. Maxwell cited by Basu does not support him as to the law *at present*. It definitely says that '*now* .... the repeal does not affect the previous operation of the repealed Act and .... legal proceedings may be instituted .... continued or enforced as if the repealing Act had not been passed.'[50]

In another case the Supreme Court distinguished between repealing a law and byepassing it. The Essential Supplies (Temporary Control) Act allowed the Government to make rules which, if they violated any other law in force, would still be held operative. The Act did not repeal them itself, it gave the executive the power to issue rules which could disregard other existing laws. The Court held that rules so made did not repeal the law inconsistent with them, but byepassed them for attaining the aims and objects defined in the Act. The inconsistent laws remained in force for all other purposes, but to the extent of their inconsistency they would be ignored, byepassed so far as the rules made under the impugned Act were concerned.[51]

NOTES

1 *Supreme Court and Supreme Law*—Edited by Edward Cahn, 25. Chief Justice Taney claimed that the Supreme Court had earlier in 1794 held an act of the Congress unconstitutional in United States v. Yale Todd. The case was neither reported nor was any opinion thereon recorded. United States v. Ferreira, 13 How. 40(1951).

2 Justice Roberts in the United States v. Butler 297, U.S. I 62-63 (1936).

3 Ibid, 63.

4 Prof. Charles Fairman, in *Bacon Lectures*, 445, 447, 454.

5 Cahn, opp. cit., 19.

6 Prof. Thayer—*Harward Law Review*, 1893, page 144.

6a James v. Commonwealth of Australia (1936) A.C. 578, 614.

7 Thayer, 150.

8 Justice Garrison in Attorney General v. McGuiness 70 NJL 437-373.

9 Prof. Thayer, op. cit., 150.

10 Law v. New Jersey 306, U.S., 451 (1939).

11 Prof. Fairman opp. cit., 447.

12 Harrison Tweed in *Bacon Lectures*, quoting Curts, 530.

13 Prof. Freund, opp. cit., 356.

14 United Public Workers of America v. Mitchel, 330, U.S. 75, 89 (1947) Cf. Hower Corwin, *The Constitution As it is Today*. 136, 137.

15 Braxton County Court v. West Virginia, 208, U.S., 192 (1908).

16 Fleming v. Rhodes, 331 U.S., 100, 104 (1947).
McCollum v. Board of Education 333 U.S. 203 (1948), Doremus v. Board of Education, 34, U.S. 429 (1952).

17 Fairchild v. Hughes 258 U.S. 126 (1922) ;
Massachusetts V. Mellon 262 U.S. 447 (1923).

18 Georgia v. Pennsylvania Road Co., 324, U.S., 439 (1945).

19 Missouri v. Holland, 252 U.S. 416 (1920).

20 Gorgia v. Tennesse Copper Co. 206 U.S. 230 (1907).

21 Alabama State Federation of Labour v. McAdory, 325, U.S. 450, 451 (1945).

22 Ex-parte Suete 162, 164, 201 (1908).

23 Federal Declaratory Judgement Act, 1934.
Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937).
Maryland Carnality Co. v. Pacific Coal Co., 312 U. S. 270, 273 (1941).

24 Justice Brandeis in Ashwender v. T.V.A. 297 U.S. 288, 346 (1936) ; Justice Matthews in Liverpool, New York and Philadelphia SS. Co., v. Commissioner for Emigration, 113 U.S. 33, 39 (1885).

25 Justice Matthews in Liverpool, New York and Philadelphia SS. Co. v. Commissioner for Emigration. 113 U.S. 33, 39 (1885).

26 Ibid. United States v. C.I.O., 335, U.S. 106 (1948)

27 Cf. *Constitution of the United States* Edited by Corwin, pp. 561-562, 570.

27a Middleton v. Texas Power and Light Co., 249 U.S. 152, 157 (1919).

28 Justice Roberts in Nebbia v. New York, 291 U.S. 502. (1934)

29 71, C.L.R. 29.

30 Willoughby on *Constitution* III, 1329-1336; Cahn (Editor), *The Supreme Court and the Supreme Law*, 36 to 47. Cf. Coleman v. Miller, 307 U.S. 433 (1939).

31 Pollock v. Farmer's L. T. Co., 158, U.S. 429.
In Carter v. Carter Coal Company (293 U.S.A. 238), the Court insisted on interpreting the Statute as a whole, even though the Statute itself declared that some of its sections were severable.

32 Abitibi Pulp and Paper Co. v. Montreel Trust, 1943, A.C. 536, 18.

32a State of Bombay v. Narottamdas Jethabhai, A.I.R. 1951 S.C. 69.

33 Cf. Laskin, *Canadian, Constitutional Law,* Cf. Chamarbaugwala v. Union of India, A.I.R. 1957 S.C. 628.

34 The Engineer's Case, 28, C.L.R. 129.

35 James v. The Commonwealth, 1936, A.C. 578.

36 In re Yets, 37 C.L.R. 36.

37 Melbourne Corporation v. The Commonwealth, 74, C.L.R. 31.

38 Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1934).

39 Ferry v. Bervit, 21 C.L.R., 433.

40 Prof. Kennedy—*The Working of the British North America Act and Judicial Review*. p. 6.

41 Decision of the Court in Behram Khurshed Pesikaka v. State of Bombay 1955 1 S.C.R. 613.
Cf. A. S. Krishna v. State of Madras, A.I.R. 1957 S.C. 297, where the Madras Prohibition Act (X of 1937) S. 4 (2) was held valid.

42 Keshavan Madhav Menon v. The State of Bombay, 1951, S.C.R. 228.

43 Bhikaji Narain Dhakras and Others v. State of M. P. and Another, 1955, II S.C.R. 589.

44 Carter v. Egg and Egg Pulp Marketting Board, 1942, 66, C.L.R., 557.

45 Keshavan Madhav Menon v. State of Bombay, 1951, S.C.R. 228.

46 Ibid, 255.

47 Ibid, 239—40.

48 Ibid, 232.

49 Basu, *Commentry on the Constitution of India*, (1954) p. 54.

50 Maxwell, 9th Edn. 404.

51 The Chamber of Commerce, Hapur and Three Others v. The State of U.P. 1955, 1 S.C.R. 848.

CHAPTER IV

INTERPRETING THE CONSTITUTION AND THE LAW

(2)

For the purposes of judicial review of legislation, the Supreme Court has to interpret both the Constitution and the impugned legislation. Even though the Indian Constitution is not the Delphic oracle that the Constitution of the United States has been said to be, the Supreme Court was sometimes hard put to it to gather the meaning of certain constitutional provisions. It is interesting to find that the Indian Supreme Court had difficulty in interpreting just those provisions which have provided so much work for the Supreme Court in the United States. Liberty of person,[1] equality at law,[2] inter-state commerce[3] and property rights,[4] though each of them has been treated in the Indian Constitution at a greater length and more precisely than it is in the Constitution of the United States, raised almost similar problems. In the end most of them had to be redefined by constitutional amendments, in some cases more than once.

It should be remembered that just as the American revolution had been crowned with the adoption of the Constitution of the United States, the Indian Constitution formed the culminating point of an equally purposeful though peaceful revolution. Because it was peaceful, the judicial institutions in the country continue almost uninterrupted. It is little realized sometimes that article 13, which made all the pre-Constitution laws inoperative to the extent of their repugnancy to the fundamental rights, carried through a revolutionary programme which the Supreme Court was called upon to implement. This legal revolution centred round these rights mostly. No wonder that, as explained below these provisions had to be interpreted and re-interpreted so often.[5]

The court has made most of the American and English cannons of judicial review its own. It adopted many of the judicial restraints which in the United States are matters of prudent behaviour. It has refused to write essays on constitutional interpre-

tation for the benefit of private persons.' It insisted that it would decide the instant case only when it reached it as a controversy between real contestants. It would not decide the question of constitutionality of an impugned Act, if the case in court could be decided on other grounds, nor formulate a rule of constitutional law broader than is required by the precise facts to which it is applied. In Dhakeshwari Cotton Mills Ltd. v. The Income Tax Commissioner, West Bengal,[6] it declined to go into the question whether the unfettered discretion vested in the Central Board of Revenue to transfer a case of income tax assessment from one 'circle' to another income tax circle was or was not void when it could quash the order on the ground that it went beyond the powers said to have been conferred on the Central Board of Revenue by the impugned Act. This procedure some times proved rather embarassing to the government and may have, as in the cases regarding Investigation of Income Tax Act, occasionally slowed down the speed of the entire administrative machinery.

Some of the justices protested against this tendency, particularly when it took the shape of examining subordinate legislation along with the Act and deciding the case in Court on the basis as to how the law was presumed to have affected it alone. In some of the cases it might have been the result of a tendency to hold a law constitutional if it could be narrowed down in its operations and then held constitutional. To some of the judges it must have seemed that the enacting authorities were being let off very lightly. They feared that such 'leniency' may affect the temper of the legislatures concerned and make it disregard fundamental rights extensively. It must be admitted however that neither the legislatures nor rule making authorities made any attempt at misunderstanding the judgments of the Court and subject it to undue strains. If Bombay Sales Tax Act was held valid read along with the rules promulgated as soon as the Act became operative,[7] Bombay State made no attempt at changing the rules so as to make them as wide as the Act permitted it to do. If the Saurashtra Ordinance was held valid because of the accident of the notification under it omitting to refer *any* cases, to the newly created special courts,[8] the Saurashtra Government tacitly took it that the Ordinance

stood amended in the sense in which the Supreme Court had held it valid. When Chief Justice Kania read 'shall' in place of 'may' in the case of Dr. Khare,[9] the Punjab Government and the Delhi Administration took the hint and decided to supply grounds for externment to those against whom they intended to take action. Despite the forbodings of Justice Bose[10] no disastrous results followed this innovation in interpretation.

For innovation it must be held to be. It did not restrict the general meaning of the words used in the statute. It did not attempt to read into the constitutional provisions what apparently was not there. It did not seek support in a theory of natural law or the police power of the State. Boldly and openly it grafted the statutory rules and regulations to the Act and lo it took a new shape and was valid.

In doing so the court repudiated the doctrine of 'preferred liberties' as applied to freedom of speech and expression or to hold that as far as civil liberties are concerned statutes dealing with them may be presumed to be unconstitutional unless they have been proved to be constitutional. It is true that neither of these doctrines is now followed in the United States as much as it used to be in the forties, notwithstanding the recent decisions of the Warren Court in 1957. The change there, however, has been mostly due to new legislative trends arising on account of the present international tensions. It may seem unfortunate, however, that whereas the Supreme Court in the United States was almost always ready in the forties to hold a statute controlling civil liberties unconstitutional when it could be proved that, as applied to some one other than the applicant in court it could work hardship, the Supreme Court in India has refused to examine statutes in cases in Court and held them unconstitutional even when they were frankly discriminatory and disadvantageous to the applicant, simply because it could not be proved beyond doubt that the *procedure* adopted had proved disadvantageous to the accused. It is likely that the Supreme Court's decisions were governed more by the 'area interest' considerations than some of its judges cared to admit. It is necessary to remember that the laws treated so tenderly were laws of former princely states and that the cases in Court

sometimes referred to the post-constitution part of the procedure in cases that had arisen in feudalistic Saurashtra or Khaksar-ridden Hyderabad long before the Constitution was adopted. It is reassuring to find that almost similar procedure in what had been British India till recently was never sustained.[11] Instead we find the Court declaring that measures which affect the liberty of the subject and his right to property should be strictly construed.[12] In Tolaram Relumal and Another v. State of Bombay, the Supreme Court went further and declared that if two possible and reasonable constructions can be put upon a penal proviso, the court must lean towards that construction which imposes the penalty.[13]

The American maxim that the court will not pass on the constitutionality of a statute on the complaint of one who has availed himself of its benefits seems to have been formally followed by the Supreme Court in Nain Sukh Das v. State of U.P. when the applicants sought to have the municipal election set aside even when he had participated in them. But, though the Supreme Court, in the best American tradition, refused to make the order prayed for, it did, now that the merits of the case had been argued before it, pronounce upon the constitutionality of the impugned legislation and held it unconstitutional. It added a rider that though the Court would not grant the writ asked for under the circumstances, other remedies were open to the applicant.[14]

The Court seems to hold that a law must be presumed to be valid unless it is proved invalid. The onus of satisfying the court that the impugned legislation is invalid lies on one who seeks relief or offers a defence on the plea that the statute is invalid. This has produced some fine hair splitting in India as elsewhere. Sometimes the process through which relief has been sought may enter into the Court's decision. A case in a regular appeal always deserves a more thorough analysis of the problem before the Court than a case questioning a final order made by a competent court or tribunal. A writ application questioning the validity of a statute or action taken under a statute may fail because the petitioner failed to destory the presumption of its constitutionality.[15]

In M. K. Ranganathan v. Government of India, the Supreme Court declared that (i) it is a well-recognised rule of construction

that 'when two or more words which are susceptible of analogous meaning are coupled together *noscunter a sociis*, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general, (ii) it is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them, (iii) the legislature does not intend to make a substantial alteration in the law beyond what it explicitly declares either in express words or by clear implication and that (iv) the general words of an Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched.[16]

The Supreme Court has also held that it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing this intension with irresistible clearness.[17] But 'once the conclusion is reached that a particular measure was lawfully enacted by a legislative authority covering the particular case in question, the hands of the court are tied and the legislative measure will have to be given its effect unless *mala fides* or abuse of power was alleged.' It further declared that if the words of an enactment are capable of only one interpretation on 'plain and grammatical construction thereof, *non-abstante* clause cannot cut short that construction.'[17a]

In the State of Madhya Pradesh v. G. C. Mandawar, though the Supreme Court declared that the power of the Court to declare an Act void under article 13 has to be exercised with reference to the specific legislation which is impugned, it added a rider. 'It is conceivable', the Supreme Court declared, 'that when the same legislature enacts two different laws but in substance they form one legislation, it might be open to the Court to disregard the form and treat them as one law and strike it down, if in their conjunction they result in discrimination.'[18]

Occasionally the Supreme Court seemed to take 'the policy of the legislature' and 'other deeper considerations at stake' into

consideration when examining the validity of an administrative act alleged to be done under a valid Act. In K. N. Guruswamy v. The state of Mysore, when the validity of a license to sell alcoholic drinks was in dispute, it said in part, the policy of the legislature is that matters of such consequence to the state revenue cannot be dealt with arbitrarily and in the secrecy of an office. Whatever is done must be done either under the rules or under a notification which would receive like publicity and have like force, and of which the people at large would have like notice.'

'But deeper considerations are also at stake, namely, the elimination of favouritism and nepotism and corruption. To permit what has occurred in this case would leave the door wide open to the very evils which the legislature in its wisdom has endeavoured to avoid.'[19] In Aswini Kumar Ghosh v. Arbind Bose, the Supreme Court declared that the statement of objects and reason appended to the bill should be ruled out as an aid to the contents of a statute.[19a] But in Kedarnath Bajoria v. State of West Bengal, the Supreme Court sought to gather the real purpose and policy of the West Bengal Criminal Law Amendment Act, 1949 from its title and preamble in addition to its provisions.[19b] In State of West Bengal v. Subodh Gopal Bose, it permitted the statement of object and reasons of the Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950 to be referred to for the limited purpose of ascertaining the conditions prevailing at the time which led the sponser of the bill to introduce the same and the extent and urgency of the evil he sought to remedy.[19c]

In India, as in other federations, the question of the division of powers between the federal government and its units has often come up for decision before the highest court. The Indian Constitution has tried to learn from the experience of other countries and avoided conflict in this sphere as much as possible. Unlike federal governments in Australia and the United States, the federal government in India is not a government of enumerated powers alone. It shares with its units quite a large area of administration under its concurrent powers. The powers of the units are also enumerated while the residuary powers lie with the federal government.[20] The units can call upon the federal government to perform

some of their functions just as the federal government can ask the units to act as its agents.[21] The Australian doctrine denying interchange of functions, because this would destroy the state-hood of the units,[22] does not prevail here and much of the usual conflict has thus been avoided.

In the field of concurrent legislation India has gone in a new direction. Whereas in Canada and Australia, the doctrine of complete occupancy of the field along with the theory of the higher value attached to federal legislation to the extent that both cover the same area prevails, the Indian Constitution allows a State to amend an earlier federal law in the concurrent list provided the President gives his consent to the amending legislation.[23] This, however, does not prevent Parliament from legislating comprehensively on the same matter and thereby modify, add or repeal the earlier law passed by the State.[23a] As the Supreme Court held in Chaudhari Tika Ramji and Others. v. The State of U.P., the power of Parliament under proviso to article 254(2), to repeal a law passed by the State legislature is limited to adding to, varying, amending or repealing a State law on the same matter i.e., concerning the same things—the State law made by the State legislature, and consented to by President, with reference to a matter in the concurrent list containing provision repugnant to an earlier law made by Parliament. 'It is only such a law that could be altered, amended or repealed under the proviso. The impugned Act U.P. Sugar Cane (Regulation of Supply and Purchase) Act of 1953 is not a law relating to any matter which is the subject of an earlier legislation by Parliament.' 'It is a substantive law covering a field not occupied by Parliament.' The Supreme Court, therefore, held section 16(1)(b) of the federal Act X of 1955, which purported to repeal the U.P. Act, invalid.[24] This gives precedence, within the State, to a law, covering a field not covered till then by federal Parliament, made by the State legislature and assented to by the President. For all practical purposes, the field once allowed by the federal government to be occupied by a State legislature may not be recovered by the federal government.

This is a curious result. Even under the Government of India Act, 1935, the Indian legislature was allowed, with the consent of

the Governor General, to recover a field thus conceded to a provincial legislature.[25] It is not likely that the framers of the Constitution intended yielding any more to the units than the Government of India Act had done. The failure of the draftsman to express the intentions of the legislature may lead to an amendment of the Constitution.

Another fruitful field of judicial review is provided by delegated legislation. It has long been the practice of legislatures to create other authorities, representative bodies, administrative agencies and professional corporations and vest in them the right to make bye-laws. All over the world the legislatures have to deal with so many problems that it has now become a practice to lay down the broad outlines of the policy in the Acts passed by the legislature leaving it to the executive to fill in the outline. Legislation has become so complex and so technical that it is futile to expect the lay wisdom of the legislators to cope with all the problems thus raised. This again makes subordinate legislation by delegation necessary. At times the legislature may lay down a law but leave its application to persons, things or areas to the executive. Many laws leave the date of bringing them into operation to be notified by the executive.

In India the last two categories have usually been considered to lead to ancillary action rather than involve delegated legislation.

Laws were made in India by the executive till 1862. Even under the Indian Councils Act of 1861 laws continued to be made by the Governor-General-in-Council, Governor-in-Council or Lieutenant Governor, as the case may be, with some co-opted officials and non-officials helping each of them in the work. When a new territory was added to British India, to begin with, laws were made for it by the Governor-General in Council or by some body on its behalf. Thus in Captain Ganpati Singh v. State of Ajmer,[26] the Supreme Court conceded that the Chief Commissioner of Ajmer had been created a legislating authority by Ajmer Laws Regulation of 1877.

Act XXII of 1869 excluded the District of Garro from the operation of the Indian Civil and the Indian Criminal Procedure Codes, but the Lieutenant Governor of Bengal was given the power to introduce any law or part of a law in force in the rest of the

province in Garro. In 1878 the Privy Council in Burrah v. the Queen [27] held that this was not delegation of legislative authority but only an exercise of ancillary administrative authority created by legislation.

In 1912 when Delhi became a Chief Commissioner's province, the Delhi laws Act, 1912 was passed by the Indian Legislative Council authorizing the Chief Commissioner of Delhi to introduce central or a provincial law with necessary restrictions and modifications in Delhi. The Ajmer-Merwar Extension of Law Act, 1947 gave the Chief Commissioner of Ajmer similar authority. Neither Delhi nor Ajmer-Merwar had any legislature of its own at the time. The Indian however, legislature, could legislate for them in all matters. But central Acts usually covered matters of all-India importance.

When the Constitution went into force in 1950, Part C States (Extension of Laws), Act, 1950, was passed by the central legislature conferring on the executive not only the power to extend to any Part C State a law in force in any Part A State, with necessary restrictions and modifications, but also the power to make provisions for repealing and modifying laws so extended.

Here again, it is necessary to remember that Part C States had at this time no legislating organs. They were in fact Union territories for which the central government could legislate. The Part C States Act was intended to put away, as it were, the burden of legislating for these areas from the shoulders of Parliament and continue the practice, already prevailing in some of these areas, of the executives extending to such area laws in force elsewhere. There was however a lacuna in the exercise of this authority. Laws could be extended by the executive. But they could not be withdrawn or modified by the executive when once extended. The Part C States Act, 1950 now vested in the executive the power to make provisions for such repeal or amendment in the notifications extending the Act. It seemed the Law Ministry had not probably realised the full effect of the judgment of the Federal Court in Jatindranath Gupta v. The Province of Bihar on this power as exercised so far. The Federal Court had held such delegation of legislating functions void.[28] In course of time some

cases came to courts challenging the validity of the laws so extended. To short circuit the question, the President made a reference to the Supreme Court asking it for its advisory opinion about the three Acts.

In Delhi Laws Act case all the judges of the Supreme Court gave their advisory opinions. These cover almost 400 pages of the *Supreme Court Reports* and range over a very wide field. Justice Mahajan held all the Acts ultra vires.[29] Chief Justice Kania held that the central legislature could authorize the local government or central government to extend central laws with restrictions and modifications to Chief Commissioner's province or Part C States but could not validly allow the executive to extend the Provincial laws or Part A States Laws to a Chief Commissioner's province or a Part C State.[30] Chief Justice Kania, Justices Mahajan, Mukherjee and Bose held Part C States (Extension of laws) Act invalid to the extent it gave the central government power to make provisions for repealing or amending the Acts extended to Part C States.[31] Justices Mukherjee and Bose held all the impugned laws valid so far as they gave the executive the power to extend laws in force elsewhere to a specified territory or territories with minor modifications and restrictions involving no substantial changes in or modifications of the policy of the legislations so extended.[32] Justices Fazl Ali, Patanjali Shastri and Das placed no boundaries round the restrictions and modifications permitted to the executive and held all the three impugned Acts valid in their entirety.[33]

In the result it was held a valid exercise of legislative authority for the legislature to arm the executive with the power to pick and choose legislation passed by other legislatures and apply it, with minor modifications, to the areas where there was no local legislature in existence.[34]

This power is as 'extra-ordinary' as the power which, in Roche v. Kronheimer, the Australian High Court conceded Parliament of Australia possessed; power to make a law which remits the whole matter to the regulation of the Governor-in-Council.[35]

In Rajnarain Singh v. Chairman, Patna Administration Committee, Patna the issue raised was whether the Governor of Bihar, while extending a part of a provincial Act to an area within the

State, could destroy a condition which the authorising Act held imperative before such extension could take place. A unanimous Court held the notification issued by the Governor of Bihar on April 23, 1951 extending parts of the provision of the Bihar and Orissa Municipal Act, 1922 to Patna invalid as it subjected 'Patna' to municipal taxation without giving the inhabitants of the area an opportunity of being heard in the matter as required by sections 4, 5 and 6 of the Bihar and Orissa Municipal Act, 1922.[86] The Act had authorised the executive to choose any section or sections of the Act and apply it to any area in Bihar. The Court held that this could be done only if section or sections chosen did not affect any essential change in the Act or alter its policy.

In the United States 'unconfined and vagrant delegation, not confined within banks that keep it from overflowing', has usually been held invalid. The Supreme Court in India has also applied this test in some cases to delegation of authority to the executive and held invalid uncontrolled delegation. When the Chief Commissioner of Ajmer delegated his legislative power to make rules for holding fairs to the district magistrates, the Supreme Court held the rules so made void and inoperative.[87] It held the U.P. Coal Control Order invalid under the circumstances discussed below.[88]

In Harishankar Bagla v. The State of M.P. it was said that as settled by the majority judgment in the Delhi Laws case, the essential powers of legislation cannot be delegated. "In other words, the legislature cannot delegate its function of laying down the legislative policy in respect of a measure and its formulation as a rule of conduct. The legislature must declare the policy of the law and the legal principles which are to control any given case and must provide a standard to guide the official or the body in the power to execute the law."[89] In Indar Singh v. State of Rajasthan, the Supreme Court found the policy of the law in 'the preamble to the ordinance' which it held 'sets out with sufficient clearness the policy of the legislature and also that of section 15 of the ordinance. The decision of the Government cannot therefore be said to be unguided.'[89a]

Similarly, in Harishankar Bagla v. State of M.P. the Supreme Court held that 'the preamble and the body of the sections in

Essential Supplies (Temporary Powers) Act 1946 sufficiently formulate legislative policy', the details of which can only be worked out 'by delegating power to a subordinate authority.' It therefore held that section 3 of the Act which delegates such power is not ultra vires. It further held that as Section 4 of the Act enumerates the classes of persons to whom the power could be delegated or sub-delegated, it is not correct to say that the instrumentalities had not been selected by the legislature itself.[40]

In Edward Mills Co., Ltd. v. The State of Ajmer[41] it was contended that section 27 of the Minimum Wages Act 1948 which authorises the appropriate government to add to the list of employments for which minimum wages could be fixed was invalid. The Chief Commissioner of Ajmer as the appropriate government had added in October 1950 employment in textile industry to the list of employments given in the schedule to the Act. It was held that 'this delegation of authority was not in the circumstances of the present case unwarranted and unconstitutional.' The legislature had laid down the legislative policy in the Act and also declared that the list of industries to which the Act would apply may be added to by the appropriate government. The delegation of authority was controlled by the implied indication that minimum wages in industries other than those specified in the Act may be fixed under the Act when such industries reach the same level of development and importance.

The Government of Hyderabad was authorised under section 5(b) of the Hyderabad Ordinance to delegate its powers to make over cases for trial to special Judges. The Chief Minister by a general notification in the official Gazette delegated this authority to civil administrators in every district. The Supreme Court held such delegation by office valid.[42] In F. N. Roy v. Collector of Customs the Supreme Court held that the discretion vested in the Collector of Customs under S. 167 of Sea Customs Act was valid. The maximum penalty was Rs. 1,000 and the discretion must be exercised within the limits so fixed. The test of the quantum of fine is the gravity of the offence. The discretion is further more vested in High Customs Officers and there are appeals from their orders.'[42a]

Following the early traditions of the Indian judiciary the Supreme Court continues leaning on English judges and jurists so far as interpretation of the Indian Statutes is concerned. The Federal Court in interpreting the federal provisions of the Indian Constitution was not unwilling to seek help from American case law and from American jurists. The Supreme Court, particularly when interpreting the Constitution, continues to draw upon the American experience. Australian and Canadian judgments have sometimes been quoted with approval.

The Supreme Court however is aware that though it is interpreting a Constitution, it is the Indian Constitution that it has to interpret. It has, therefore, refused to be overawed by the weight which interested parties may sometimes like to attach to foreign precedents. It has resisted all attempts to make the due process of law the maid of all legal work which it has come to be in the United States. It has rejected the American doctrine of waiver when considering fundamental rights.

'The Doctrine of waiver enunciated by some American judges', the Supreme Court said in Behram Khurshid Pesikaka v. State of Bombay, 'cannot be introduced in our Constitution without a fuller discussion of the matter. We are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution.

'These fundamental rights have not been put in the Constitution merely for individual benefit. They have been put there as a matter of public policy. The doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy'. [48]

In Raja Bhairavendra Narain Bhup v. The State of Assam, the Supreme Court had to consider what in the United States would have been held a political question and therefore not one for the Court to consider. It was contended that Assam State Acquisition of Zamindars Act of 1951 had not been enacted according to law. The Court went into the question on the facts of the case and held that it had been validly enacted. Controverting the argument of the appellants, it found that the Governor gave his sanction to introduce the bill in the provincial legislative assembly on

21 July 1948. It held that the Governor had validly reserved the bill for the consideration of the Governor-General. The Governor-General on 25 January 1950 returned the bill to the Governor advising him to reserve the bill for the consideration of the President who was to take the place of the Governor-General the next day. It was contended that under article 395 of the Constitution, the Indian Independence Act, 1947 and the Government of India Act 1935 as amended to date stood repealed when the Constitution came into force. The Supreme Court, however, held that under article 389 of the Constitution, a bill pending in the legislature immediately before the commencement of the Constitution could be continued in the appropriate legislature. It further held that as a matter of fact, the impugned bill was pending before the Assam legislature as it had not been vetoed either by the Governor or the Governor-General. The Governor-General's act in sending it to the Governor for reservating it for the consideration of the President implied that he wanted the bill to be kept alive. The Supreme Court conceded that "his action may have been unconstitutional", but it did not amount to declaring that he withheld his assent. As such, the bill remained alive. In the facts and circumstances of the case, the Supreme Court held that as the bill was in the hands of the Governor or in transit between the Governor-General and the Governor it must be taken to have been pending before His Majesty and therefore the legislature. As the bill was pending before the relevant legislature, the Governor could reserve it for the consideration of the President. The President could similarly take action on it under article 201 directing the Governor to return the bill to the legislature with his message. The Assembly considered the message and sent up the amended bill through the Governor to the President who gave his assent and the bill was validly enacted.[44]

Though in a decision or two it seemed to be falling back on the American theory of an abundant 'police power', it has so far refrained from deciding a case on that ground alone. In deciding cases involving property rights it has sometimes referred to the rights of 'eminent domain' which every State is supposed to possess. It seems, however, to accept the English dictum that the

statutory (constitutional) provisions override common law rights and royal prerogatives and therefore the positive provisions of the Indian Constitution override the vague rights of eminent domain. Like courts almost everywhere, it has sometimes been tempted to refer to dictates of 'natural Justice' where it really meant a fair trial. But when in F. N. Roy v. Collector of Customs, Calcutta an attempt was made to persuade the court that because the appiicant had not been heard by the Appellate Customs Authority before it dismissed his time-barred appeal, it declared that natural justice did not demand a hearing under such circumstances.[45]

Attempts have been made to pursuade the Supreme Court that a constitutional provision meant what some speakers in the Constituent Assembly had said it did. It held in State of Travancore-Cochin v. Bombay Co. Ltd. Alleppy that the speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution cannot be used in interpreting an Article of the Constitution.[46] It had the distinction of hearing the Chairman of the Drafting Committee of the Constituent Assembly argue before it what certain constitutional provisions were intended to mean. It refused to seek help from such sources where the provisions of the Constitution were plain and clear. Occasionally some of the justices have tried to gather what evil a particular provision of the law or the Constitution was intended to cure. Unfortunately one such attempt found the Court hopelessly divided.[47] In another case, Justice Bose was left alone to argue where such an exercise would lead the Court in deciding a question of fundamental rights.[48]

The legislation regarding rights in land, particularly in areas which lay outside British India, raised problems of great intricacy. The Court was called upon to apply such modern concepts as an estate, to rights in land sometime existing from times immemorial. Here history was called upon to act as a hand-maiden to law. The Supreme Court probably had the toughest case in its history when, in Thakur Amarsingh v. Rajasthan, the constitutionality of Rajasthan Resumption of Jagirs and Estates Act was attacked before it. Unlike a historian, the Court could not suspend judgment because there was not enough material for a proper decision. It is possible

that its interpretation of various rights in land in the case may be assailed by a historian going into the question leisurely. The Supreme Court, however, had to do its best under the circumstances with the help of such material as had been placed on record in the case.[49]

In interpreting statutes and constitutional provisions, the Court may sometimes try to narrow down the interpretation of a provision by taking help from marginal headings, statement of the objects and reasons of a measure when it was introduced in the legislature, the preamble of a statute and the description of the Act but only when the exact meaning of the words used in the Constitution or the statute was not plain or clear.[50] Similarly the Court has held that the same word appearing in the same section or the same set of rules must be given the same meaning unless there is anything to indicate the contrary. But the Court declared that 'in a penal Statute, it is the duty of the Courts to interpret words of ambiguous meaning in a broad and liberal sense so that they will not become traps for the honest, unlearned (in the law) and ordinary men. If there is honest and substantial compliance with an array of puzzling directions, that should be enough even if on some hypercritical view of the law other ingenious meanings can be devised.'[51]

In Ramaswamy Nadar v. the State of Madras, the Supreme Court declared that if in constructing Section 423 (1) (b) Criminal Procedure Code, the Court has to apply some words to make the meaning of the word statute used therein clear, it would refer naturally the construction which is more in consonance with reason and justice.[52]

NOTES

1 Articles 21, 22 of the Constitution of India.
2 Articles 14, 15 and 16.
3 Article 286.
4 Articles 31 and 19(1) (f).
5 See below, Chapter XVI.
6 Dhakeshwari Cotton Mills Ltd. v. The Income Tax Commissioner, West Bengal, 1955, 1 S.C.R. 941.
7 State of Bombay v. The United Motors (India) Ltd. and others, 1953 S.C.R. 1069.

8 Kathi Raning Rawat v. State of Saurashtra, 1952 S.C.R. 435.
9 Dr. N. B. Khare v. State of Delhi, 1950 S.C.R. 519.
10 Justice Bose in 1956 S.C.R. 287.
11 The State of West Bengal v. Anwar Ali Sarkar, 1952 S.C.R. 284.
12 Dominion of India v. Shirinbai A. Irani and another, 1955, 1 S.C.R. 206.
13 Tolaram Relumal and another v. State of Bombay, 1955, 1 S.C.R. 158.
14 Nain Sukh Das v. State of U.P. 1953 S.C.R. 1184.
15 See below, Chapter XIII.
16 M. K. Ranganathan v. Government of India, 1955, 2 S.C.R. 374.
17 Ibid., 387.
17a Dominion of India v. Shirinbai Irani, 1955, 1 S.C.R. 206.
18 State of Madhya Pradesh v. G. C. Mandawar, 1955, 1 S.C.R. 599.
19 K. N. Guruswamy v. The State of Mysore, 1955, 1 S.C.R. 305.
19a Aswini Kumar Ghosh v. Arabind Bose, 1953 S.C.R. 1.
19b Kedarnath Bajoria v. State of West Bengal, 1954 S.C.R. 30.
19c State of West Bengal v. Subodh Gopal Bose, 1954 S.C.R. 587.
20 Constitution of India, Schedule VII.
21 Articles 258 and 258A.
22 The Commonwealth of Australia Constitution Act, 1900.
23 Article 213 (3) proviso.
23a Zaverbhai Amaidas v. State of Bombay, 1955, 1 S.C.R. 807.
24 Chaudhari Tika Ramji and others v. The State of U.P. 1956 S.C.R. 393.
25 Government of India Act, 1935, Section 107 (2).
26 Captain Ganapati Singhji v. The State of Ajmer, 1955, 1 S.C.R. 1065.
27 The Queen v. Burrah, 51 I. A. 178.
28 Jatindra Nath Gupta v. Province of Bihar, 1949 F.C.R. 595.
29 In re-the Delhi Laws Acts, 1912, 1951 S.C.R. 959.
30 Ibid., 800.
31 Ibid., (Kania, C.J. 805, Mahajan, 959, Mukherjee, 1010, Bose, 1124.).
32 Ibid., (Mukherjee, 853, and Bose, 885).
33 Ibid., (Fazl Ali, Patanjali Sastri and Das, J.J., 1101).
34 Ibid., 1124-25.
35 Roche v. Kronheimer, 29 C.L.R. 329.
36 Rajanarain Singh v. Chairman, Patna Administration Committee, Patna, 1955, 1 S.C.R. 290.
37 Captain Ganpati Singhji v. The State of Ajmer, 1955, 1 S.C.R. 1065.
38 Messrs. Dwaraka Prasad Laxmi Narain v. The State of U.P., 1954 S.C.R. 803.
39 Harishankar Bagla v. The State of M.P., 1955, 1 S.C.R. 380.
39a Inder Singh v. State of Rajasthan, A.I.R. 1957 S.C. 516-517, 1955, 1 S.C.R. 388.
40 Harishankar Bagla v. The State of M. P., 1955, 1 S.C.R. 388.
41 The Edward Mills Co. Ltd., v. The State of Ajmer, 1955. 1 S.C.R. 735.
42 Habeeb Mohammad v. The State of Hyderabad, 1954 S.C.R. 475.

42a F. N. Roy v. Collector of Customs, A.I.R. 1957, S.C. 651.
43 Behram Khurshed Pesikaka v. The State of Bombay, 1955, 1 S.C.R. 613.
44 Raja Bhairabindra Narayan Bhup v. State of Assam, A.I.R. 1956, S.C. 503.
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Union of India v. Chamanlal & Co. A.I.R. 1957, S.C. 652.
46 State of Travancore-Cochin v. Bombay Co. Ltd., Alleppy, A.I.R. 1952, S.C. 364.
47 Bengal Immunity Co. Ltd., v. The State of Bihar, 1955, 2 S.C.R. 603.
48 Justice Bose in Syed Quasim Razvi v. The State of Hyderabad and others, 1953 S.C.R. 589.
49 Thakur Amarsinghji v. The State of Rajasthan, 1955, 2 S.C.R. 303.
50 Commissioner of Income Tax, Bombay City v. Bhogilal, 1954 S.C.R. 444, Nalinakhya Bysack v. Sham Sunder Haldhar and others, 1953 S.C.R. 533.
51 Seksaria Cotton Mills Ltd., v. State of Bombay, A.I.R. 1953 S.C. 278.
52 Ramaswami Nadar v. The State of Madras, A.I.R. 1958, S.C. 69.

APPENDIX

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13. Major Walter—Gazetteer of Mallani.
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CHAPTER V

JUDICIAL CONTROL

I. Criminal Cases

THE SUPREME COURT in India is not only the ultimate expounder of the law of the Constitution, it is the final court of appeal in civil and criminal cases as well. It may sit in appeal on a High Court giving a certificate that a case involves a substantial question of law or it may grant special leave to appeal. Early in its history it was called upon to define its function when sitting as a court of final appeal. It refused to constitute itself into a third court of fact and revaluate evidence offered in the case when, as in Pritam Singh v. the State, the evidence 'had impressed the four assessors and two courts below'.[1] In Damodaran v. State of Travancore Cochin, it refused to substitute its own appreciation of the evidence for those of the courts below in the face of concurrent finding of facts by both the courts below.[2] Similarly in Thakur Prashad v. State of Madhya Pradesh it refused to go behind the concurrent findings of facts against the accused in both the Courts below.[3] In Lachman Singh and Others v. The State it declared that 'it is not the function of the Supreme Court to reassess evidence and an argument on a point of fact which did not prevail in the court below cannot avail the appellants in the Supreme Court.[4] In Virendrajit v. State of Bombay it made its position still clearer by holding that 'The Supreme Court would not be justified in disturbing the decision of the courts below on special leave *merely* on the ground that *perhaps* a different inference could also have been drawn from the facts found in a case'.[5] In Rameshwar Bhartia v. The State of Assam[6] it declined to permit a question of fact which had to be investigated afresh to be raised for the first time in appeal to the Supreme Court.

But in Sadhu Singh v. State of Pepsu[7] the Supreme Court set aside the decision of the High Court convicting the appellant of murder. 'The act of the accused as disclosed in the first information report and the statement made to the police may well have

been regarded either accidental or rash and negligent'. But in the statement made by the witnesses in the trial, the whole version as to the nature and character of the act of the accused was completely changed and the act of the accused was deliberately made to look like an act of deliberate murder. 'Such difference between the first information report and the version of events given during the course of the trial', the Supreme Court held, 'goes to the root of the case'. It held that the High Court was clearly in error in holding on the basis of the evidence in trial that the accused was guilty. Similarly when the findings by the courts below omitted to notice the points which, in the opinion of the Supreme Court, swung the balance the other way, the Supreme Court refused to let the findings stand.[8]

In Hate Singh v. State of Madhya Bharat,[9] the Supreme Court examined the evidence at length in the case. It said that there were special reasons in this case why they felt that the testimony of the eye-witnesses cannot be accepted at their face value as against Hate Singh. 'The same eye-witnesses who implicate B also implicate H. They have both been believed. But the accused person put forward a reasonable defence which is likely to be true and was supported by two prosecution witnesses. The rule is that in such a case the burden on the prosecution becomes all the heavier because a reasonable and probable story likely to be true when pitted against a weak and vacillating case is bound to raise reasonable doubts of which the accused must get the benefit'. The Supreme Court deprecated 'any desire to depart from our usual practice of declining to reassess evidence in a appeal here', but as there had been 'a departure from the rule (regarding appraising evidence) in this case,' it did so and quashed the conviction and the sentence passed by the High Court.

In Hanumant v. the State of Madhya Pradesh the Supreme Court found that a finding of fact was arrived at on the testimony of a witness who was admittedly an accomplice. 'The courts below had departed from the rule of prudence that such testimony should not be accepted unless it is corroborated by some other evidence on the record'. The Supreme Court repeated that 'when the court of first instance and the court of appeal arrived at con-

current findings of facts after believing the evidence of a witness, the Supreme Court does not disturb such findings save in most exceptional cases'. Evidently it found the present finding as one in such cases and declared that 'such a finding, in the circumstances of a particular case may well be reviewed, if other circumstances in the case require it and if substantial and grave injustice has been done ! [10]

'Where a jury has been misdirected and has based its verdict on assumptions and conjectures, the Supreme Court may order a retrial or remit the case to the High Court with a direction that it should consider the merits of the case in the light of the decision of the Supreme Court and say whether there has been a failure of justice as a result of misdirection. The Supreme Court may examine the merits of the case and decide for itself whether there has been a failure of justice in the case'.

But in disposing of the appeal of Sarvan Singh and Harbans Singh on April 13, 1957, the Supreme Court quashed the judgement of the Punjab High Court on findings of fact even though both the courts below had concurred in those findings. Justice Gajendragadkar declared for the Court that they were doing so because the Punjab High Court had adopted an erroneous approach to the question of the proper appreciation of the evidence of an approver. The High Court had not considered the question of the reliability of the evidence of the approver. It was further held that the confession of the approver was not voluntary. [11]

In Mushtak Husain v. State of Bombay [12] the Supreme Court took upon itself 'the responsibility of deciding this case without the valuable opinion of the High Court which had dismissed the appeal summarily.' The Supreme Court held that the jury had been misdirected. The trial judge in conclusion, had addressed the jury as follows, "After weighing the probabilities of the case and evidence on record, as prudent men, if you come to the conclusion that the story given by the prosecution does not appear to be probable and that the accused must not have committed the offence, then in that case, you have to return a verdict of not guilty." This was clearly misdirecting the Jury. "All that the Jury should have been told was that after weighing the probabilities of the

case and evidence on the record, as prudent men they should answer whether the prosecution had made out the charge against the accused". The Supreme Court felt satisfied that as a result of these misdirections the jury gave a divided verdict of guilty on the basis of assumptions and conjectures. In this case again, the Supreme Court came to the conclusion that in the peculiar circumstances of this case, it is most conducive to the ends of justice to decide for themselves whether there has been a failure of justice resulting in the conviction of an innocent man. 'Any other course,' the court felt, 'would cause unnecessary harassment to the appellant'. Examining the case on merits, the Court accepted the appeal, set aside the verdict of the jury and acquitted the appellant of the offence with which he was charged.

In Ram Kishan Mithanlal Sharma v. the State of Bombay,[13] the Supreme Court held that there had been an error of law in admitting evidence of the test identification parades in regard to the appellant. The admission of such inadmissible evidence would amount to a misdirection in the learned judge's charge to the jury in regard to the accused. The Supreme Court held that three courses, as in the case of Mushtak Hussain v. State of Bombay, were open to it. Here again the Court decided to take the whole case into consideration, examine the merits of the case and decide for itself whether the conviction could be maintained. On the merits of the case it dismissed the appeal.[14]

Shreekantia Ramayya Munipalli v. The State of Bombay[15] also turned on the grounds of misdirection or non-direction to the Jury. Once again, all the three courses as above were open to the Supreme Court. In the trial court the jury found all the three accused guilty of offence against the Prevention of Corruption Act and for criminal breach of trust; they were convicted and sentenced. One bench of the Bombay High Court dismissed summarily the appeal of the one of the accused, the other admitted the appeal but rejected it on merits. The Supreme Court quashed the conviction of and the sentence on the second accused as 'the Governor-General had not sanctioned his present prosecution'. In the case of Munipalli, the Supreme Court held that the Additional Sessions Judge had misunderstood the scope and content of S. 34 of the

Indian Penal Code and misdirected the jury about the law. 'It is the essence of the section that the person must be physically present at the actual commission of the crime, (criminal breach of trust in furtherence of the common intention of all). The Sessions Judge had directed that a person could be convicted even though he may not be present when the offence is actually committed and even if he remains behind the scene. There was also non-direction to the jury. The Sessions Judge after holding the evidence led by the prosecution about the payment of Rs 4,000 to the appellant to be utterly useless, omitted to follow it up by telling the jury that this being so, the strongest part of the case against the accused collapsed. The Supreme Court in appeal quashed the conviction of this accused. The Supreme Court, however, did not direct a retrial though this is the normal course when a jury trial is set aside on grounds of misdirection and non-direction. All the accused were said to have acted in concert. The present trial against the second accused could not proceed as no sanction of the Governor-General to prosecute him had been obtained. Thus a retrial of all the three accused jointly was impossible. In such circumstances, the Supreme Court discharged "both the appellants leaving it to the Government either to drop the entire matter or to proceed in such manner as it may be advised. We do this because the accused expressly asked that the charge under the Prevention of Corruption Act should be left over for a separate trial".

In Darshan Singh v. State of Punjab, [16] the appellant had been convicted on the supposed admission of Attar Singh to the crime in which Darshan Singh and Attar Singh had both been involved. On appeal the Supreme Court held the supposed admission of Attar Singh inadmissible as evidence and set aside the judgment of the High Court and the Sessions Court. The case was remanded to the Sessions Court 'to be heard afresh on evidence on record in the light of observations made after excluding from consideration the supposed admission of above Attar Singh'.

The Supreme Court has held that 'in murder cases, the discretion was judge's to award death sentence or a lesser penalty. If he gives reasons on which a judicial mind could properly find, an appellate court should not interfere. The only ground on which

the appellate court can interfere is that the discretion has not been properly exercised, as for example (i) where no reasons are given (ii) and none can be inferred (iii) or where the facts are so gross that no judicial mind could have awarded the lesser penalty'.

In Pandurang, Tukia and Bhilia v. the State of Hyderabad,[17] though the Supreme Court conceded that 'a question of sentence is, and must always remain, a matter of discretion unless the law otherwise directs, and therefore the Supreme Court did not intend to fetter the discretion of the Judge in this matter', it reduced the sentences of death in the case of Bhilia and Tukia to one of transportation of life. It argued that 'when the appellate judges who agree on the question of the guilt (of the accused) but differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons. We see no reason to depart from this practice'.

In Dilip Singh and others v. The State of Punjab,[18] the Supreme Court declared that there must be strong reasons to entitle the appellate court to enhance (in a murder case) the sentence of transportation to the sentence to death. It is not enough if the appellate court feels that left to itself it would have awarded greater penalty of death. The power to enhance a sentence from transportation to death should be exercised where the discretion of the trial court has been improperly exercised. In the instant case the Supreme Court reversed the decision of the High Court and reduced the sentence to transportation. Similarly in Aher Raja Khema v. State of Sourashtra[19] the Supreme Court declared that in an appeal against acquittal it is not enough for the High Court to take a different view of the evidence, there must be substantial and compelling reasons for holding that the trial court was wrong.

In H. N. Rishbud and Indar Singh v. State of Delhi,[20] the Supreme Court directed that the Special Judge trying the two accused for criminal misconduct in the discharge of their official duties, 'take the two cases on his file and pass appropriate orders after reconsideration in the light of the judgment of the Supreme Court in the case'. Whereas the special judge had dismissed the two cases against the two public servants because investigation of the cases against them had not been carried on, as required by the

law, by a police officer 'not lower in rank than a deputy superintendent of police', the Supreme Court held that when the breach of such a provision is brought to the knowledge of the court (which has already taken cognizance of the case) at a sufficiently early stage', as it was in the case, 'the court while not declining cognizance, will have to take the necessary steps to get the illegality cured and defects rectified by ordering such re-investigation as the circumstances of an individual case may call for.' It conceded that the investigation not in accordance with the law was illegal, but held that the illegality could be cured.

In Nanak Chand v. State of Punjab, the appellant had been convicted of murder under section 302 I.P.C. though he had not been charged with the offence. 'In defending himself the appellant was not called upon to meet such a charge and in his defence he may well have considered it unnecessary to concentrate on that part of the prosecution case.' The Supreme Court, therefore, allowed the appeal, set aside 'the conviction and sentence of the appellant' but remanded the case of the appellant to the Court of Sessions at Jullundur 'for retrial after framing a charge under section 302 I.P.C. according to law'.[21]

Twenty four persons, among them Nar Singh, Nanhu Singh and Roshan Singh were tried for rioting. Sixteen of them were acquitted and eight were convicted. On appeal the High Court at Allahabad acquitted five and convicted Nanhu Singh instead of Bechan Singh and acquitted Bechan Singh instead of Nanhu Singh. On the High Court's realizing their mistake, they communicated it to the State Government which remitted the rest of the sentence mistakenly passed on Nanhu Singh and released him. Nanhu Singh, Nar Singh and Roshan Singh presented an application to the High Court for a certificate permitting them to appeal to the Supreme Court. The High Court thought that Nanhu Singh had a right to a certificate as he stood wrongly convicted of a crime of which he was not guilty. But they treated the entire appeal of the eight accused as one case and therefore granted the application of all the three applicants and certified that the case was a 'fit one for appeal to the Supreme Court'. Nanhu did not appeal to the Supreme Court but Nar Singh and Roshan Singh did. The

Supreme Court held that article 134 (1)(c) gives the High Court a discretion to grant or withhold the certificate but it is a 'judicial discretion and must be judicially exercised. If it is properly exercised, there would be no interference except on very strong grounds. But if, on the face of the order, it is apparent that the Court had misdirected itself and considered that its discretion was fettered when it was not, the Superior Court must either remit the case or exercise the discretion itself'. The Supreme Court held that 'the certificate was wrongly granted to the appellant' now in Court as the High Court had granted it in the mistaken belief that the applicants had a right to it because the third accused who had been tried with them was entitled to it. It refused to hear the appeal on the certificate. But the Supreme Court was seized of the matter. It decided therefore to treat the present case as if the Supreme Court had given the applicant special leave to appeal but dismissed the appeal on merits. [22]

In Khushal Rao v. State of Bombay [23] the Supreme Court held that 'a High Court exceeds its power if the certificate granted under Article 124 (1)(c) discloses that the main ground related to a question of fact. The High Court is not justified in sending up such a case for further consideration by this Court which does not ordinarily concern itself with deciding mere questions of fact unless such questions arise on a certificate granted under article 124 (1) (a) and (b).

'The appeal on such a case has to be dismissed *in limine*. But we have to satisfy ourselves whether there are such grounds as would justify this court in granting special leave to appeal. We uphold the judgment of the High Court and dismiss the appeal.'

In Baladin v. State of U.P.[24] the Supreme Court refused to regard the appeal as properly certified under Article 134(1) (c), but examined the case as if it was a case under Article 136 for special leave to appeal. The High Court had in the course of its judgment added 'leave to appeal to the Supreme Court is granted.' The Supreme Court held that the High Court had not properly exercised its judicial discretion in granting the right to appeal. On merit, the appeal was partly allowed and four of the appellants ordered to be released forthwith.

In Kapur Singh v. State of Pepsu in special leave to appeal, the Supreme Court altered the conviction of the appellant from that under section 302 to one under section 304 (1) (A) and converted the sentence of death to one of transportation for life, as the intention of the appellant was not to kill the deceased outright.[25]

In Kalavati and others v. State of Himachal Pradesh,[26] the Supreme Court was hearing an appeal against the decision of the Judicial Commissioner convicting the appellant of murder under sections 114 and 312 of the I. P. C. Originally the trial court had convicted her under section 201. The Supreme Court quashed her conviction for murder and thus accepted the appeal. The State had not appealed. The Supreme Court, however, restored the appellant's conviction under section 201 for aiding and abetting the offence of murder, 'as the acquittal order was immediately connected with the conviction under sections 148 and 312 and took place only because the accused was convicted of the main charge under sections 114 and 302'.

In Kuldip Singh v. The State of Punjab and another,[27] the hierarchy of courts in Punjab come up for review before the Supreme Court in connection with sanctioning prosecution of the appellant for perjury. The order for such prosecution can be given 'either by the court where the perjury is committed or by the successor court or by some other court to which such court is subordinate,' i.e., the lowest court to which appeals ordinarily lie from such court.

The perjury was committed in the court of a subordinate judge of the first class. The prosecution for perjury was sanctioned by the senior subordinate judge. The 'additional session judge' in appeal held that the senior subordinate judge had no jurisdiction to make the complaint. The High Court in appeal reversed the order of the additional judge and restored the order of the senior subordinate judge.

In appeal, the Supreme Court had to disentangle the judicial organisation in the Punjab. It held that every district has a district court. Some of the work of this court could be assigned to other courts i.e., the court of the additional judge, the court of the senior subordinate judge and the court of any other subordinate

judge who may be designated to entertain and determine appeals from other subordinate judges. The Supreme Court held, however that even then there was only one district court in a district, the court over which the District Judge presided. The office of the additional district judge is unknown to the law in Punjab. His proper designation is additional judge. The subordinate judges are divided into four classes, according to the pecuniary limits of their jurisdiction. The senior subordinate judge (a subordinate judge first class) could be deemed to be a district court for the disposal of two specified classes of cases in which appeals lay to him direct, i.e., without the cases being assigned to him by the District Judge. In the instant case, the Court held that the complaints for perjury made by the senior subordinate judge was without jurisdiction, as perjury had not been committed in his court, nor did appeal from a subordinate judge first class ordinarily lie to him. It further held that the order of the additional judge passed under his designation of additional district judge dismissing the complaint for perjury was also without jurisdiction. His court was not the district court to which appeal lay from the decision of the subordinate judge first class. The order of the High Court sanctioning complaint was also held to be without jurisdiction as the High Court was not the court to which appeals from the court of the subordinate judge lay immediately. The Supreme Court ordered that the case be sent to the District Judge for disposal according to law.

In Vemi Reddy Satyanarayan Reddy and three others v. The State of Hyderabad,[28] the question of corroboration of the evidence of a single witness who, though not an accomplice, fell "somewhat short of requirements which would confer on him that status." The appellants had been convicted of murder of V. Shastri by the Sessions Judge, Verangal and awarded death sentence. In the High Court, the two judges composing the bench differed as to whether the prosecution has established its case beyond reasonable doubt. The matter was referred to a third judge. He confirmed the conviction but in view of an earlier ruling of the Supreme Court discussed above, he reduced the sentence to imprisonment for life. In an appeal by special leave the Supreme Court had to face two

questions. The only witness of the murder of the deceased by the accused was a Dhobi boy who had been compelled to act as their camp-follower by the accused and some other members of their group. The Supreme Court conceded that, though he was not an accomplice, they would still want corroboration of his evidence on material particulars. Such corroboration, however, need only have to be of the material part of the story told by the witness and connecting the accused with the crime so as to satisfy reasonable minds that the man can be regarded as a truthful witness. In the case in Court, the Supreme Court held, 'the evidence of prosecution witness 14 has been amply corroborated.'

The second question concerned the identification of the body which was exhumed some twenty days after the murder. On account of the body being putrified it was contended that the identification of the dead body must have been impossible. The Supreme Court however held that from the general features, form, outline cantour, built of the body and the appearance of such of the limbs as were available, it would not have been difficult for close associates of the deceased to say that it was his corpse. The rope round the body had been identified as the one used by the accused to lead away the deceased. The Dhoti and the Jajam were also identified. The Supreme Court dismissed the appeals.

In Thevar v. State of Madras, the Supreme Court declared that 'the contention that in a murder case the court should insist on plurality of witnesses is much too broadly stated. The administration of justice may be hampered if a particular number of witnesses were to be insisted upon. The court naturally has to weigh carefully the evidence of a single witness but if it is satisfied that the evidence is reliable and free from all taints, it becomes its duty to act upon such testimony, the exception to this rule, where the testimony of a single witness is by its very nature suspect, being that of a participator.'[29]

In Harihar Chakravarti v. State of West Bengal,[30] the Supreme Court quashed the order of Justice K. C. Chandra of the High Court of Calcutta against the appellant who had been acquitted by the Presidency Magistrate of the charge of criminal breach of trust with regard to fifteen Baranagar Jute Mills shares. Justice

Chandra had accepted the finding of the Presidency Magistrate that the appellant was not guilty of criminal breach of trust with regard to these fifteen shares. He, however, adopted the extra-ordinary procedure of directing that the charge should be amended so as to relate to criminal breach of trust in the disposal of those shares to Nath Bank to which they had been pledged. The Supreme Court held that the High Court had no right, while setting aside the order, to direct retrial on fresh grounds which the complainant had not set forth.

In Jangal Prashad v. The State of Madhya Pradesh,[31] the Supreme Court held that the High Court of Madhya Pradesh should not have passed the order radically changing the mode of punishment (9 months' rigorous imprisonment for 10 stripes) and seriously affecting the accused without giving him an opportunity to show cause against it. It set aside the sentence and remitted the case to the High Court for its disposal according to law.

In Pushkar Singh v. The State of Madhya Bharat[32] the order of the High Court asking the appellant, who had been acquitted of the charge of theft, to return Rs. 463 to the complainant whose title to the amount had not been upheld by the court was set aside as the 'High Court had ordered the return of the money without convicting the accused by due procedure of law.'

The Supreme Court declared in Machander v. State of Hyderabad[33] that 'courts would not be permitted to keep persons who are on trial for their lives under indefinite suspense, because trial judges omit to do their duty. Justice is not one-sided. It has many facets and a court has to draw a nice balance between conflicting rights and duties. While it is incumbent on the court to see that the guilty do not escape it is even more necessary to see that persons accused of crime are not indefinitely harassed.

'They must be given a fair and impartial trial and while every reasonable latitude must be given to those concerned with the detection of crime and entrusted with the administration of justice, limits must be placed on the lengths to which they may go. Except in clear cases of guilt, where the error is purely technical, the forces that are arrayed against the accused should no more be permitted in special appeal to repair the effects of their bungling than an

accused should be permitted to repair gaps in his defence which he could and ought to have made good in lower courts.

'The scales of justice must be kept on an even balance whether for the accused or against him, whether in favour of the State or not; and one broad rule must apply in all cases.'

In State of Bihar v. M. Homi and another [84] the Supreme Court applied the dictum that the terms of a penal bond must be very strictly construed with curious results. Execution of the sentence on one Maulavi A. Ali Khan was suspended pending the hearing of his appeal to the Privy Council. He was released on bail on furnishing security worth Rs. 50,000 with two sureties of Rs. 25,000 each. The sureties undertook to produce the accused within three days of receipt of a judgment of the Judicial Committee if his sentence was upheld either partly or wholly. The surety bond was dated 19 October 1946. On account of constitutional changes, the appeal came to be heard by the Supreme Court which dismissed it in November 1950. The accused failed to surrender himself to custody and in December the Deputy Commissioner Singhbhum called upon the sureties to produce Ali Khan within three days. On their failure to do so, the Deputy Commissioner ordered them to show cause why their bonds should not be forfeited. When the question reached the Supreme Court it decided that the terms of the bond must be strictly interpreted. The surety bond could not be forefeited. The accused was to surrender within three days of the judgment of the Privy Council; the Privy Council never heard the case and the terms of the bond could not be enforced.

Similarly in the State of U.P. v. Mohammad Sayyed the surety bond of Mohammad Sayyed executed in favour of the King Emperor Kaisar-e-Hind could not be enforced in republican India.[85]

II. Civil Appeals

A quarrel arose between two groups of shareholders of Edward Mills Co., Beawar. An extra-ordinary meeting held for the election of the chairman was dissolved by the chairman of the meet-

ing after a conflict between the two parties. The other party, however, continued to hold the meeting and elected Motilal as the chairman of the company. The rival group applied to the District Judge, Ajmer for a declaration that the appointment of Motilal as chairman was illegal, invalid and ultra-vires. The plaint also asked for the appointment of a receiver for the company until a properly qualified chairman, managing director, etc., were duly appointed. The additional district judge dismissed the suit. In appeal to the Judicial Commissioner, Ajmer the appellant giving up the second relief asked for and restricted himself to a relief so far as a declaration was concerned. The Judicial Commissioner ordered the payment of court fees on both the reliefs and on non-payment of the fees dismissed the appeal. The appellant took the case to the Privy Council obtaining special leave to appeal. The Supreme Court inherited the case as one of the undecided appeals from the Privy Council.

S. 12 of the Court Fees Act makes final the decission of the trial court in every question relating to valuation for the purpose of determining the amount of the chargeable stamp-fees. The Supreme Court held that this did not prevent it from reviewing the order in appeal. In the present case, the Supreme Court[86] declared that the Judicial Commissioner was wrong in dismissing the suit because of non-payment of stamp-fees determined on both the reliefs sought in the original court.

The Supreme Court held that it was open to an appellant to give up a portion of his claim and restrict his appeal to the rest. The memorandum had to be stamped according to the relief sought. Holding that the memorandum had been adequately stamped, it sent the case back to the Judicial Commissioner for decision in accordance with the law as now interpreted.

In Jugalkishore Rameshwardas v. Mrs. Goolbai Hormusji,[87] the Supreme Court held that the dispute between the parties was centred round the question whether Jugalkishore was acting within the scope of the authority granted him by Mrs. Goolbai Hormusji. It was a dispute which arose out of the contract of employment of Jugalkishore as a broker by Mrs. Goolbai Hormusji. It was a dispute as between a principal and her agent. On Mrs. Goolbai

Hormusji's contending that she had not authorised Jugalkishore to sell certain shares on 11 August 1947, Jugalkishore referred the case to the Native Share and Stock Brokers Association, Bombay for arbitration in pursuance of a clause in the contract note. Mrs. Hormusji, though invited to do so, declined to take part in the arbitration proceeding. The arbitrators in their award upheld Jugalkishore's contention. Mrs. Hormusji filed an application for setting aside the award. The city civil judge dismissed her application. In appeal, the High Court of Bombay held the contract notes between Jugalkishore and Mrs. Hormusji were void under the Bombay Securities Contracts Control Act of 1925 as they were not contracts for ready delivery.

In appeal the Supreme Court reversed the finding of the High Court about the nature of the contract. It held the contract valid as between a principal and her agent. The High Court had held the arbitration award invalid because the contract on which it was based was, according to the High Court, void. But Mrs. Hormusji had contested the arbitration award on other ground as well. The Supreme Court referred the case back to the High Court ordering that the appeal be reheard.

Anderson Wright Ltd, purchased 12 lakhs yards of hessian cloth by two 'Bought Notes' passed by Moran and Co. Ltd, undertaking to deliver at the rate of 1 lakh yards per month, payments to be made in cash on delivery. The 'Notes' included an arbitration clause under which all disputes were to be referred to the arbitration of the Bengal Chamber of Commerce. No goods were delivered for the month of March 1951. The Anderson Wright Ltd, insisted on the delivery of goods for the month of March 1951. Moran and Co., declared that Anderson Wright had failed to give shipping instructions for the said goods within the time mentioned in the contract. Anderson Wright claimed Rs. 1,13,042-3-0 as damages for non-delivery. On Moran & Co.'s refusing to meet the demand, Anderson Wright contemplated referring the matter in dispute to the arbitration of Bengal Chamber of Commerce. Moran & Co. filed a suit in the High Court against Anderson Wright Ltd, praying for a declaration that they were merely brokers acting for a principal and therefore not a

party to the contract. They asked for an injunction restraining Anderson Wright from claiming any damages.

Anderson Wright thereupon filed a suit applying for a stay of the proceedings. A single judge of the High Court granted the prayer. On appeal against this order, a divisional bench of the High Court vacated the order for stay. Anderson Wright appealed against this decision of the High Court. The Supreme Court held[88] that the High Court should have decided whether there was a binding arbitration agreement between the parties to the suit and not vacated the stay order simply on the ground that Moran and Co. was not a party to the contract. The main question was about the nature of 'Bought Notes'. 'In our opinion, the point is not free from doubt and requires careful consideration. As we have not the advantage of the view of the learned judges of the High Court on it, the proper course for us to follow would be to send the case back for hearing of and a decision on this point. The matter will go back to the appellate bench of the Calcutta High Court which will decide the question whether the respondent was or was not a party to the arbitration agreement. If the Court is of opinion that the respondent was in fact a party, the suit shall be stayed and the appellant would be allowed to proceed by way of arbitration.'

In Trojan and Co. v. Rm. N. N. Nagappa Chettiar,[89] the dispute was between a principal and his stock broker. The principal complained that he had been a victim of fraud perpetuated by the defendants who had failed to disclose the fact that the shares they sold, or most of them, belonged to one of their partners and that there was a likelihood of a slump in the market. The suit of the broker for the amount of the claim against the principal was dismissed by the single judge who heard it. The appeal against this order was also dismissed and leave to appeal to the privy council refused.

The principal filed a suit for the rendition of accounts against the brokers, Trojan and Co. The single judge decreed the claim of the plaintiff. The appellate court set aside his decision and remanded the suit for fresh disposal. It was again decreed by another single judge who heard it now. The appellate bench of the High Court modified the award by reducing it.

The defendant had ceased to contest that he was guilty of

fraud after this had been found against him in the first court. The main dispute was whether the plaintiff had suffered any damage and if so, how much. Clerk J. who heard the case after remand estimated that the damage suffered by the plaintiff was the difference between the purchase price of the shares and their sale price. The High Court upheld this decision. The Supreme Court held that the measure of damages can only be the difference between the price which the buyer had paid and the price which he should have received if he had resold them in the market forthwith. 'The question to be decided in such a case is what could the plaintiff have obtained if he had resold forthwith that which he had been induced to purchase by the fraud of the defendants. Ordinarily the market rate of the shares on the day when the fraud was practised would represent their real price. If the market was vitiated or was in a state of flux or panic, the market rate on the earliest date when the real facts became known may be taken as the real value of the shares. If there is no market or there is not satisfactory evidence of market rate for sometimes, then if the representee sold the shares within a reasonable time and on reasonable terms, the price fetched at the resale may well be taken into consideration in determining the true market value. If the representee had not sold the things, subsequent event may be taken into accounts.' Presumably the courts below, though they correctly enunciated the rule of measuring damages in such cases, did not measure the damages accordingly. Even though, the question of assessment of damages is a question of facts and the concurrent findings of the courts below except on every exceptional circumstances are not reviewed by the Supreme Court, the Supreme Court held that it had no alternative but to arrive at its own findings. It accepted the appeal in part reducing the decree from Rs. 61,787 to Rs. 42,175.

In a quarrel over church properties in Malabar two factions started court proceedings in 1938. In 1946 the High Court of Travancore-Cochin decided the case holding that one of the factions had separated from the church and thereby lost all right to church properties. In review the High Court rejected the application for review in 1951. The Supreme Court heard the case in 1954 in a

special appeal and allowed the appeal as there was an error apparent on the face of the record—in that the affidavit filed in the Supreme Court disclosed that the High Court assumed that a concession had been made where none had been made and misconceived the terms, scope and extent of the concession made. The High Court had decided the case against the appellants. The Supreme Court set aside the judgement of the High Court and 'directed the entire appeal to be reheard on all points unless both parties accept any of the findings of the High Court.'[40]

K. N. Guruswamy made the highest bid for a liquor contract for the year 1953-54 in the State of Mysore. His bid was accepted. The Excise Commissioner cancelled the sale in favour of Guruswamy because a higher bid had been made directly to him by Thimmayya. The Deputy Commissioner was asked to take action under Rule 10 of the Retail Vendor of Excise Rules. This lays down that shops sales of which have been cancelled will ordinarily be disposed of by reauction, by tender or otherwise at the discretion of the Deputy Commissioner later on. As the Excise Commissioner had enclosed the higher tender of Thimmayya, the Deputy Commissioner accepted it. K. N. Guruswamy asked for a writ restraining the Government of Mysore from giving the contract to Thimmayya and awarding it to him. The Supreme Court held the action of the Deputy Commissioner void. Before accepting a tender he had to call for tenders by notification in the Mysore Gazette. If the contract was to be disposed of 'otherwise', the Supreme Court held, the fact had to be notified under the Mysore Rules. 'Under the circumstances', the Supreme Court declared, 'we would, therefore in the ordinary course have given the appellant the writ he seeks. But there is barely a fortnight of the contract (for the year 1953-54) to go. A writ would therefore be ineffective and as it is not our practice to issue meaningless writs, we must dismiss the appeal and leave the appellant content with an enunciation of the law.'[41]

In Ebrahim Vazir Mavat v. State of Bombay[42] the Supreme Court held that an Indian citizen could not be prevented from entering India on the mere suspicion that he had gone to Pakistan to become a citizen of that country. 'It would be repugnent to

all notions of democracy and opposed to fundamental rights to order the expulsion of a citizen from the country, for this would destroy the right of citizenship conferred on him.' 'The accused was offered no opportunity to clear his conduct of the suspicion entertained against him.' The Supreme Court held s. 7 of the Influx from Pakistan (Control) Act of 1949, under which action had been taken, void. The Supreme Court ordered that a copy of its order holding that the appellant was at liberty to enter India be communicated to the Indian High Commissioner in Pakistan. The appellant, after having been deported from India had requested the High Commissioner for India in Pakistan to grant him a permit to return to India.

In Sri Sri Sri Kishore Chandra Singh Deo v. Babu Ganesh Prashad Bhagat and others,[48] it was contended that the mortgage deed in contention in the suit was not validly registered. It has been presented for registration by an agent of Sri Kishore Chandra Singh Deo. Mr. Tap presented the mortgage deed for registration under a power of attorney executed in his favour by the Zamindar before the registrar at the Hindol House, Cuttack, because Sri Kishore Chandra Singh was ill. The Supreme Court held that 'when the Registrar, authenticated the power of attorney at the residence of Sri Kishore Chandra Singh Deo, he must be presumed to have done so on an application setting out the proper ground and that he satisfied himself that the ground did exist. Whether he was right in his conclusion that the defendent was suffering from bodily infirmity is not a matter which can be gone into in a court of law. It is a matter exclusively within his jurisdiction and his decision even if erroneous would not effect the validity of the registration.'

Some medical students of the Utkal University presented a petition to the High Court of Orissa, under article 226. They requested the court to direct the syndicate to publish the results of the first M.B.B.S. examination. The syndicate had cancelled the examination in autumn held previously and ordered the holding of another examination in the subject on 7 May 1951. The High Court held the resolution passed by the syndicate cancelling the examination and ordering a new examination invalid, as

proper notice of the meetings of the syndicate had not been given to two syndics. It further went into the facts which had led the syndicate to cancel the examination and order a new examination. The High Court held that the syndicate had acted unreasonably and without due care. The Supreme Court in appeal held that the High Court was wrong in holding that the two resolutions were invalid. 'Whatever may be thought about each meeting taken separately, the defects, if any, are in our judgment cured when the two are read together and regarded as a whole.' The first meeting held on 21 April decided unanimously to cancel the results and hold another examination on 7 May. All the members except one were present at the meeting. The second meeting was held on 28th. Here the protest of the students against the decision of the syndicate was considered. The syndicate unanimously refused to review the former resolution. The member who was absent in the first meeting was now present. But one of the members who has supported the cancellation in the first meeting was absent from the second meeting.

Though the High Court had rightly held that in a mandamus petition the High Court cannot constitute itself into a court of appeal from the authority against which the appeal is sought, 'in the present case, they had done just what they said they could not do.' The Supreme Court in appeal held that the law having entrusted the right to control the examination, invalidating an examination and ordering a re-examination to the judgment of the syndicate, it is not the function of the courts of law to substitute their wisdom and discretion for that of the syndicate. It further declared that 'it is inaccurate to describe what the syndicate did as hasty, and unjust to characterize their action as unreasonable and lacking due care.' They decided that 'this is decidedly not the sort of case in which a mandamus ought to issue.' [44]

The Supreme Court had an interesting situation to cope with in Shiromani Gurdwara Prabhandhak Committee, Amritsar v. Raja Shiv Ratan Dev Singh. [45] The High Court by its final order in the case remanded it to the trial court for decision in accordance with law. But the appellants approached the Supreme Court for special leave to appeal against the order of the High Court. Before the

Supreme Court granted the special leave to appeal, the trial court passed a decree in accordance with the direction of the High Court. When special leave to appeal was granted, the Supreme Court declared that the decree of the trial court, even if not appealed against, cannot be said to be conclusive so as to prevent the Supreme Court from dealing with the appeal, setting aside or modifying the judgment of the High Court and making, if necessary, a fresh—and a different—order of remand to the trial court.

When an arbitrator heard one party in the absence of another, without giving notice of the hearing, the Supreme Court declared that this course of proceedings was obviously contrary to principles of natural justice. Such a legal misconduct was held sufficient to vitiate the award.[46]

III. Industrial Disputes

Under the provisions of the Constitution or by statutory laws the final power to dispose of certain cases rests among others with the Industrial Disputes Tribunals, Election Tribunals and the Income Tax Appellate Tribunal. The Supreme Court was called upon to define its own relations with such tribunals first of all in Bharat Bank Ltd v. Employees of the Bharat Bank.[47] It is interesting to record that the Central Government through its counsel asserted that the Supreme Court had no right to entertain an appeal against an award given by the All-India Industrial Tribunal (Bank Disputes), Bombay. It was conceded that under article 226 of the Constitution, a High Court could issue a writ if a tribunal, domestic, administrative or quasi-judicial exceeded its jurisdiction. Justice Mahajan held in dissent that by article 136 the Supreme Court has been given overriding power to grant special leave to appeal against orders of courts and tribunals which go against principles of natural justice and lead to miscarriage of justice. Article 136 empowers this Court to grant special leave in cases where a court subordinate to a High Court has passed or made an order and the situation demands that the order should be quashed or reversed. The power to grant special leave under this article could be exercised against inter-locutory orders also.

It was contended in the case that the word tribunal in article 136 had been put only by way of abundant caution. 'It must be presumed', Justice Mahajan declared, 'that the draftsmen of the Constitution knew well the fact that there were a number of tribunals in this country which were performing certain administrative, quasi-judicial or domestic functions. It must also be presumed that the Constitution makers were aware of the fact that the highest court in this country had held that all tribunals that discharged judicial functions fell within the definition of the expression, court. The intention of the Constitution by the use of the word tribunal in the article seems to have been to include within scope of the article 136 tribunals with many of the trappings of a court which nevertheless are not courts in the strict sense of exercising judicial power. Such tribunals exercise quasi-judicial function.' 'The word tribunal in article 136 had to be construed liberally and not in any narrow sense. An industrial tribunal, in as much as it discharges functions of a judicial nature in accordance with law, comes within the ambit of the article and from its determination an application for special leave is competent. An Industrial Disputes Tribunal adjudicates an industrial dispute in accordance with the provisions of the Industrial Disputes Act. The tribunal is not given any executive or administrative powers. It consists of experienced judicial officers; its award is defined as determination of the dispute'. As the Supreme Court defined it later on in Maqbool Hussain v. State of Bombay,[48] a judicial decision presupposes an existing dispute between two or more parties and then involves four questions:—

(1) The presentation of their case by the parties to the dispute; (2) If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) If the dispute between them is a question of law, the submission of legal arguments by the parties and (4) A decision which disposes of the whole matter by a finding upon facts in dispute and application of the law of the land to the facts so found, including, where required, a ruling upon any disputed question of law. As Justice Fazl Ali put it, 'an Industrial

Disputes Tribunal has to adjudicate in accordance with the provisions of the Industrial Disputes Act. It may sometimes override contracts but so can a court which has to administer law according to Bengal Money Lenders Act.

'The Tribunal has to observe the provisions of the special law which it has to administer. The appellate court can at least see that the rules according to which it has to act and the provisions which are binding on it are observed and its powers are not exercised in an arbitrary or capricious manner.' 'In cases where a State or the Central Government is not a party to the dispute, the Government cannot alter or cancel, or add to the award but the award must be declared to be binding as it is'.

Justice Mahajan thus defined the function of the Supreme Court in such cases. In sitting in appeal under article 136 on such tribunals,' this Court is not to substitute its decision for the determination of the tribunal. When it chooses to interfere in the exercise of these extraordinary powers, it does so because the tribunal has either exceeded its jurisdiction or has approached the question referred to it in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the well established rules of natural justice. All that the Supreme Court, when it entertains an appeal, would do is to quash the award and direct the tribunal to proceed within the powers conferred on it and approach the adjudication of the disputes according to principles of natural justice.'

The Supreme Court upheld the decision of the Industrial Tribunal in Vishwamitra Press v. Workers of Vishwamitra Press [49] valid and hence binding on the parties. It was objected that the order was not within time. The original period expired on 9 June 1951 but the Uttar Pradesh Government validly extended the period up to 30 June 1951. The Industrial Tribunal was a court within the meaning of U.P. General Clauses Act, and therefore, the decision pronounced on 2 July, 1951 (when 30 June and 1 July were holidays) was well within the time.

'The Supreme Court does not sit upon the decisions of Industrial tribunals like an ordinary court of appeal, and there must be special circumstances to justify the exercise of the special power

under Article 136 of the Constitution'. 'But such special circumstances exist where the Labour Appellate Tribunal has not directed its mind to the real question to be decided on an application and has passed an order on the basis of a somewhat irrelevant finding which has resulted in manifest injustice'.[50]

In Indian Iron and Steel Co. v. Their Workmen[51] the Supreme Court once again emphasised that it does not sit as a regular court of appeal over Industrial Tribunals and does not ordinarily subject the evidence given on behalf of the parties to a fresh review unless it is shown that exceptional or special circumstances exist, or that substantial and grave injustice has been done or that the case in question presents features of sufficient gravity to warrant a review of the decision appealed from.

There was a dispute between J. K. Iron and Steel Co. and Iron and Steel Mazdoor Union about the retrenchment of 105 labourers in the mill. The Labour Appellate Tribunal held that the shortage of material which had been put forward as one of the grounds for retrenchment was only temporary and therefore the mill could lay off workmen but not retrench them. It upheld the existence of the second reason offered for retrenchment that under orders of the government the Hoop Mill was in the course of transfer to Calcutta but held that 'there was nothing on record to show which of the workmen whose retrenchment it was investigating were working in the Hoop Mill' and 'had become surplus by reason of transfer of the mill to Calcutta.' It held that retrenchment can only be made when there is a total closure of the mill or when by any such other reason the workmen become surplus. In conclusion the Tribunal held that the retrenchment was wholly unjustified. It set it aside and held that the affected workmen be deemed to be still in service and be reinstated.

The Company came in appeal against the order of the Labour Appellate Tribunal directly by special leave and also in appeal against the order of Allahabad High Court dismissing its application for a writ against the Tribunal. After its first application for special leave had been rejected by the Supreme Court, the Court entertained a fresh appeal holding that a refusal of leave on technical grounds—a failure to supply a certified copy of the order

complained against and—similarly of relief sought in appeal and in writ petition in High Court—was no bar to a new appeal.

In appeal the Supreme Court held that wide as the powers of the Tribunals are, they are not absolute and there are limitations to the ambit of their authority. Their function is to ascertain the real dispute between parties, to narrow the area of conflict and to see just where the two sides differ. It is not open to the Tribunals to reach any conclusions that they think are just and proper, disregarding the pleadings. It held that 'the adjudicator and Labour Appellate Tribunal had adopted the attitude of benevolent despots and based their conclusions on irrelevant considerations ignoring the real questions that arose out of the pleadings of the parties'. 'The real questions in dispute between the parties were neither appreciated nor considered'. It remitted the matter to the Labour Appellate Tribunal 'for a proper decision after drawing up issues that arise out of the pleadings, considering them and deciding the dispute with liberty to revert the case to the Adjudicator for a retrial or for the taking of further evidence if it is of opinion that omission to draw up issues and focus attention on the points that seem to be in dispute has had the result of shutting out evidence that might otherwise have been led.'

The Court held that it was necessary 'to make some interim order 'for payment of what may be termed a sort of subsistence allowance to the affected workmen during the pendency of further proceedings'. As there was no agreement between the parties on the subject, they left it to the Labour Appellate Tribunal or the Adjudicator, as the case may be, to make suitable orders in this respect' in the present case.[52]

In Parry and Co. v. Commercial Employees' Association, Madras,[53] the power of the Labour Commissioner to issue final orders under Madras Shops and Establishments Act was in dispute. On November 10, 1948 the Commercial Employees' Association, Madras, presented an application before the Labour Commissioner, Madras, under the Shops and Establishments Act, 1947 for decision of certain questions relating to the rights and privileges of the appellant. The Labour Commissioner heard both the parties and on 29 January 1949 decided that employees of

Messrs Parry and Co. would be entitled to over-time wages only when the statutory hours were exceeded. The Commercial Employees' Association prayed the High Court of Madras for a writ of certiorari quashing the Labour Commissioner's order. The High Court quashed the order of the Labour Commissioner. The Supreme Court in appeal held that under section 51 of the Madras Shops and Establishments Act, the Labour Commissioner is the only proper and competent authority to determine the questions referred to in that section. The section further provided that the decision of the Labour Commissioner shall be final and not liable to be challenged in any court.

'The records of the case do not disclose any error apparent on the face of the proceedings or any irregularity in the procedure adopted by the Labour Commissioner which goes contrary to the principles of natural justice. This decision does not relate to anything collateral which might affect his jurisdiction and justify a superior court in issuing a writ. The High Court cannot exercise the powers of an appellate court and correct what it considered to be an error in the decision of the Labour Commissioner.' The judgment of the High Court was set aside and the order of the Labour Commissioner affirmed.

When the Lloyds Bank asked for a writ of certiorari against an industrial disputes tribunal which had ceased to exist, the Supreme Court refused to oblige. 'Under S. 7, Industrial Disputes Act, it cannot be said that the Government must be deemed to have brought into being not an ad hoc tribunal to adjudicate upon the particular disputes referred to it but a permanent tribunal though functioning intermittently. Where the tribunal has ceased to exist and its members are subsequently engaged in the performance of other official duties, the tribunal cannot be said to continue in a sort of suspended animation and hence a writ of certiorari can't be issued for quashing its award'[54]

In Newspaper Ltd. v. U. P. State Industrial Tribunal[55] the appellants claimed that the reference by the State to the Industrial Tribunal of the case of a dismissed linotypist was not a proper reference. The Supreme Court declared that though the making of the reference under the U. P. Industrial Disputes Act is an exer-

cise of government's administrative powers, that fact does not take away the rights of an aggrieved party to show that what was referred to was not an industrial dispute at all. The Government notification referred the dispute between the Newspaper Ltd., and its *workmen*. As a matter of fact there was no dispute between the appellant and his workmen. No union of his own industry had taken up the cause of the employee dismissed for incompetence. The Supreme Court declared that even though the factual existence of a dispute may not be subject to a party's challenge, the jurisdiction of the Industrial Tribunal to make the award can be questioned. It accepted the appeal.

In Rajasthan v. the Mewar Taxtile Mills Ltd., Bhilwara and others,[56] it was contended that the appointment of Shri Sukh Deo Narain, a retired district judge of the former Jodhpur State as an industrial tribunal was invalid. The appeal had become infructuous because Shri Sukh Deo Narain had ceased to function as an Industrial Tribunal. But, as the Supreme Court 'was invited by the Advocate-General of Rajasthan as appellant to decide the question as to the validity of the appointment as an industrial tribunal, as it was likely to affect other awards made by tribunals under the Industrial Disputes Act', the Supreme Court examined the case on its merits and held the appointment of Shri Sukh Deo Narain valid.

In Atherton West and Co. v. Suti Mills Mazdoor Union,[57] the Supreme Court upheld the validity of the notification by the U. P. Government allowing members of the regional conciliation boards to transact their business in the absence of a member or members therefrom after the chairman of the Board has given due notice of the meeting.

In Clerks and Depot Cashiers of the Calcutta Tramways Co. Ltd., v. Calcutta Tramways Co., Ltd.,[58] the Supreme Court refused to upset the decision of the Labour Appellate Tribunal fixing the rates of dearness allowance to be paid to the appellants.

In Barsi Light Railway v. Employees of the Barsi Light Railway,[59] the Supreme Court held that when a business is closed or taken over by another management, the employees are not entitled to any retrenchment compensation. It upset the decision of the

Industrial Disputes Tribunal which had awarded retrenchment benefit to employees even when they had been continued in service by the Central Railway, the successor in management of the Barsi Light Railway.

The Supreme Court accepted the appeal of Model Mills, Nagpur against the decision of the State Industrial Tribunal on 25th October 1957. The State Industrial Court in upsetting the order of the Assistant Labour Commissioner had acted beyond its jurisdiction by sitting in appeal instead of in revision. As it was, the State Industrial Court had adopted a wrong and erroneous approach to the legal question involved in the dispute before it. Section 40 (1) (c) of the C.P. and Berar Industrial Disputes Settlement Act made a strike illegal when it was commenced or continued only for the reason that the employer had made an illegal change or had not carried out the provisions of any standing order. Some of the workmen here had gone on strike because they had contended that the management had reduced the number of workmen required to work one seven-bowl calender machine from three to two. Others had gone on strike in sympathy.[60]

In workmen of Burn and Co. v. Burn and Co.[61] the Supreme Court declared that 'under Article 136, it is open to the Supreme Court to consider as a court of appeal whether, in fact, the order of the tribunal was vitiated by an error of law and whether the order of the Appellate Tribunal modifying it is sound.'

In Crown Aluminium Works, Belur v. Their workmen[62] the order of the Labour Appellate Tribunal about the wage structure in the undertaking was up for consideration in a special appeal. The Labour Appellate Tribunal had included the alleged concessional payment within the wage structure of the existing employees and as such a condition of their service. It had refused to reduce the 'total payments for work' below the existing structure as 'it has been the convention with industrial tribunals not to reduce the existing emoluments of the workmen to their prejudice'. The Supreme Court observed that no industry has a right to exist unless it is able to pay its workmen at least a bare minimum wage. The employment of labour on starvation wages cannot be encouraged in a modern democratic welfare state. Even theoretically

no wage structure should be revised to the prejudice of workmen if it falls in the category of bare subsistence or the minimum wage.

'If the wage structure falls in a higher category, then it would be open to the employer to claim its revision even to the prejudice of workmen. It would indeed be very difficult to state exhaustively all considerations which may be relevant in a given case. The tribunal may have to consider whether the employer's financial difficulties could not be adequately met by retrenchment in personnel, whether the financial difficulties are temporary or are going to face the employer for a fairly long time. The tribunal must also keep in mind that substantial reduction is likely to lead to discontent among workmen that in any industry burdened with a wage structure beyond its financial capacity, its very existence may be in jeopardy. Though a saving clause has been added every time protecting the interest of such workmen as were drawing higher wages before, it would not be right to hold that there is a rigid and inexorable convention that the wage structure once fixed can never be changed to the prejudice of workmen.' But on merits the court dismissed the appeal not disturbing the finding of the Tribunal that the wages paid are an irreducible minimum or may at best be in the region of fair wages with a small margin over the minimum wage or that the concessional payments formed a part of the existing wage structure and dismissed the appeal. It declared that 'normally this Court would be slow to entertain an objection that some of the considerations which have weighed with the appellate tribunal are invalid or are not borne out by facts.'

The employees in Raja Motilal Mills Ltd., Poona, commenced or continued a strike only for the reason that the employer had made an illegal change. The Supreme Court held, in Raja Bahadur Motilal Poona Mills Ltd. v. Tukaram Piraji Musale,[63] the strike illegal, irrespective of whether or not the change is found by the Labour Court to be a legal change.

In Lakshmi Devi Sugar Mill Ltd. v. Pt. Ram Sarup and others[6] the Supreme Court declared that a lockout is neither an alteration to the prejudice of the workmen of the conditions of service applicable to them within the meaning of clause (a) nor a discharge or punishment, whether by dismissal or otherwise, of the workmen

within the meaning of clause (b) of S. 33 of the Industrial Disputes (Appellate Tribunal) Act, 1950 and therefore no permission of the Conciliation Officer, Board or Tribunal as the case may be, is necessary to be obtained before a lockout can be declared.

'Any action of the employer,' it further held, 'to the detriment of the workmen's interest would not be punishment so long as no offence was found to have been committed by the workman. The suspension under such circumstances, therefore, could not be a punishment even though it may be of an indefinite duration and would not attract the operation of s. 22 of the Act, so as to require permission thereunder before it is meted out to the wokmen.' The Supreme Court held that the Labour Appellate Tribunal ought to have held that a prima facie case for the dismissal of the workmen had been made out by the employer and ought to have granted him the permission to dismiss the workmen.

In Baroda Borough Municipality v. Its Workmen and others,[65] the Supreme Court held that the demand for bonus as an industrial claim is not covered by the Municipal Act; it is dealt with by the Industrial Disputes Act, 1947.

'The provisions in the Municipal Act cannot be stretched beyond the limited purpose, i. e. determining the quality or nature of the Municipal property or fund, for defeating a claim of bonus. It is not maintainable that, as the different activities of the Municipality constitute one integrated whole and the activities of its different departments are not distinct and unconnected activities, it is not possible as to permit isolation of one department from another.

In S. S. Shetty v. Bharat Nidhi Ltd.,[66] the appellant had been wrongfully dismissed. After he had obtained an order of reinstatement from the Central Government Industrial Tribunal Calcutta in 1950 and from the Labour Appellant Tribunal, Allahabad, in September 1951. In October 1951 he wrote to the respondent asking them to intimate to him where he should report for duty. He received no reply thereto even though a condition of the award was that it should be implemented within a month of its publication in the Government Gazette. In October 1952, the appellant filed a petition for the computation of the money value of the benefit of

reinstatement which was heard by the Central Government Industrial Tribunal, Calcutta, which awarded Rs. 1000 as the relief. His appeal was dismissed by the Labour Appellate Tribunal as no substantive question of law was involved. The appellant obtained special leave to appeal to the Supreme Court which proceeded to determine the money value of the reinstatement order. After laying down various factors which should enter into such a determination, the Supreme Court declared, 'It is impossible to compute the money value of this benefit of reinstatement awarded to the appellant with mathematical exactitude. We have devoted very anxious thought to this aspect of the matter, we have come to the conclusion that it would be reasonable to compute the benefit at an amount of Rs. 12,500.'

In Meenakshi Mills Ltd., v. Their Workmen [67] the Supreme Court held that for the purpose of awarding bonus or deciding its amount the Labour Tribunal need not follow the Income-Tax Act in allowing for depreciation. Only normal depreciation would be allowed, and not the incentive depreciation of the Indian Income-Tax Act. The Court further held that Income-Tax payable during the year must also be deducted out of the trading profits even when it is in fact not to be paid as when profit for a year is set against earlier losses.

In the State of U.P.v. Swadeshi Cotton Mills Co.,[68] the question of the interpretation of the U. P. Industrial Disputes Act, 1947 as amended by various Ordinances and the Orders made thereunder was under dispute. The Supreme Court set aside the decision of the Labour Appellate Tribunal and held the award in appeal filed before the Tribunal after the promulgation of Ordinance No. 1 of 1953 valid.

In Patna Electricity Supply Co., Ltd., v. Shri Bahram and another [69] where the Industrial Tribunal had allowed the appellant to amend its application for permission to dismiss the respondents into an application for permission to discharge them and had been overruled by the Labour Appellate Tribunal, the Supreme Court decided that the Labour Appellate Tribunal was wrong in assuming jurisdiction. No substantial question of law was involved in the Industrial Tribunal's permission to the appellant

to change his application from one of dismissal to that of discharge.

IV. Income-Tax Appeals

In dealing with cases on income-tax law the Supreme Court has had to deal with a peculiar set of judicial organization. An income-tax officer assesses an assessee to tax, the appeal lies to the Assistant Commissioner (Appellate) and a review to the Income-Tax Appellate Tribunal. In the Tribunal the assessee may demand that the Tibunal refer the law in the case to the High Court. This the Tribunal does by a statement of the case followed by questions on which the opinion of the High Court is desired. When the Supreme Court asserts its right to entertain appeals against the decisions of the High Court in such cases, it may sometimes land the Court in difficulties. The Supreme Court occasionally held that the statement of the case as formed by the Income-Tax Appellate Tribunal was defective. Though it was sitting in appeal on the High Court, it decided to call for a further statement of the case from the Court below, the Income-Tax Appellate Tribunal. Sometimes it had to send the entire case back to the Income-Tax officer who originally assessed the tax.

All this raises a delicate problem. The Income-Tax Tribunal is competent to make findings of fact. But in Liquidators of Pursa Ltd., v. The Commissioner of Income-Tax, Bihar,[70] the Supreme Court conceded that finding of fact can be disturbed by the High Court if the Tribunal has not understood the statutory language, if the finding is not supported by evidence or if it is inconsistent with evidence. It held that the proper construction of statutory language is a matter of law.

When Sohan Pathak and Sons v. the Commissioner of Income-Tax, U.P., first came up before the Supreme Court it was of opinion 'that the material facts relating to the partial partition and the formation of partnership and the finding of the Income-Tax Tribunal in regard thereto had not been clearly stated by the Tribunal in the case (to the High Court).' The Court accordingly called for, from the Tribunal, a further and clearer statement of facts on the points indicated. The Tribunal thereupon submitted

a supplementary statement and the Supreme Court allowed the appeal.[71]

In Anglo-French Textile Co., v. Commissioner of Income-Tax, Madras,[72] the Supreme Court reframed the questions which the Income-Tax Tribunal had referred to the High Court. It sent the questions as now framed for answer to the High Court within three months and decided the case after it had received the answers from the High Court.

In Dhakeswari Cotton Mills Ltd., v. Commissioner of Income-Tax, West Bengal,[73] the Supreme Court remanded the case to the Income-Tax Tribunal. The department had estimated the gross income of the appellant by taking into account the income of other such concerns during the relevant period without giving an opportunity to the assessee to challenge the relevancy of other companies' gross income to the case in point. It had also refused to examine the large mass of the material which the appellant had sought to introduce as evidence in rebuttal. Adopting the British formula that the test is not that an unjust result has been reached, but was there an opportunity afforded for injustice to be done, the Supreme Court now ordered the tribunal to give full opportunity to the assessee to place any relevant meterial on the point that it had before the Tribunal, whether it is found in the books of accounts or elsewhere. It further ordered that the Tribunal should also disclose to the assessee material on which the Tribunal is going to found its estimate of his gross income and give him full opportunity to meet the substance of any private inquiries made by the Income-Tax Officer. 'It would be open to the department to place any material or evidence on record to support the estimate made by the income-tax officer or by the Tribunal in its judgment'.

'The Tribunal, if it thinks fit, may remit the case to the Income-Tax Officer for making a fresh assessment after taking such further evidence as is furnished by the assessee or by the department.'

In the Assam Bengal Cement Co. Ltd. v .Commissioner of Income-Tax,[74] the question at issue was the true nature of the assets which the company had acquired by agreeing to pay to the lessor 'protective fees' payable over several years. The lessor (The

Government of Assam) undertook, among other things, not to grant any one else a license for manufacturing cement in the district. The Supreme Court conceded that the question at issue had 'all along been considered to be a question of fact to be determined by the Income-Tax authority'. 'The Courts of law would not ordinarily interfere with such findings of facts'. It however went on to add that such a self denying ordinance would operate only if 'such findings of fact have been arrived at on a proper application of broad principles,' which the Supreme Court summed up earlier in the judgement. Obviously the finding of fact in this case was not, in the opinion of the Supreme Court, so arrived at. It, therefore, reversed the finding of the fact of the income-tax authorities and held, as the High Court had done earlier, that as the true nature of the assets that had been acquired was an enduring benefit for the benefit of the whole of the business of the company, it was a capital asset.

A similar question arose in Commissioner of Excess Profits Tax, West Bengal v. Ruby General Insurance Co., Ltd.[75] In compiling its income accounts for the years 1940-1941, the company deducted from its income 40 per cent of the total premia received as reserve for unexpected risk on the outstanding policies and included this amount in its capital. The Commissioner held that this amount was not capital but a debt. He accordingly reduced the total capital by the amount and thereby increased the rate of profits of the company and consequently the tax payable by it. The Supreme Court on March 24, 1957 rejected the appeal and held that the reserve for unexpired liabilities could not be said to have factually contributed to the running of business or the earning of profits. It was a contingent liability but not an accruing liability within the meaning of the rule 2 of schedule 2 of the Act. The Supreme Court thereby upheld the practice of the appellant company and other general insurance companies in the country to transfer such parts of their premia to capital. In the Raghuvamshi Mills v. The Commissioner of Income-Tax, Bombay,[76] the Supreme Court held the money paid to the company by an insurance Co. for loss of profit after a fire as income and liable to Income-Tax. In Commissioner of Income-

Tax, West Bengal v. Messers Jiwan Lal, Calcutta, the Supreme Court defined, the controlling interest in income-tax cases to imply the holding of majority shares.

In Commissioner of Income-Tax, Madras v. Mtt. Ar. S. Ar. Arunachalam Chettiar,[77] a very interesting question was raised. The foreign income of the respondent for the year 1941-42 was assessed at Rs. 87, 218 by the Income-Tax Officer. Mr. Chettiar claimed further deductions. The Income-Tax Appellate Tribunal on August 20, 1943 allowed deductions of Rs. 498 for replantation expenses and Rs. 15,472 for bad debts. On September 26, 1945, the Income-Tax Officer went into the matter again and allowed in all Rs. 778 on account of replantation and Rs. 24,175 for bad debts as ordered by the Appellate Tribunal. His function now was only to carry out the order of the Appellate Tribunal. He could not otherwise reopen the assessment already made by him, but he now added Rs. 13,451 as unassessed income of previous years bringing the total foreign income to Rs. 75,806. The income-tax officer did not issue any notice of demand. The assessee appealed against this wrong assumption of jurisdiction to reopen the case. The appeal of Chettiar was however dismissed by the Appellate Assistant Commissioner. He however suggested that the assessee's remedy might lie in a miscellaneous application to the Income-Tax Tribunal complaining that the Income-Tax Officer had not given effect to the order of the Tribunal or misconstrued it. When the assessee approached the Appellate Tribunal with a miscellaneous application it directed the Income-Tax Officer to revise his estimate of income by omitting Rs. 13, 451. The Income-Tax Commissioner, Madras, challenged the right of the Tribunal to pass such an order in a miscellaneous application and prayed that three questions framed by him in this connection be referred to the High Court. The Tribunal referred the question of the validity of its own order to the High Court. The High Court on appeal asked the Tribunal to refer the question of validity of the order of the Income-Tax Officer as well to the High Court. But the High Court, when seized of the matter, declined to answer the reference as it was incompetent. The Appellate Tribunal had not issued any valid order and therefore no reference could be made to the High Court for its answering any

questions of law arising out of an order which was not there. The Income-Tax Comissioner appealed to the Supreme Court. A preliminary objection was got over by both parties agreeing to having the case treated as one by special leave rather than on the certificate granted by the High Court. It was suggested that the Supreme Court should remit the matter to the High Court for their decision on the question viz., whether any question of law arose out of an order which can properly be said to have been made by the Appellate Tribunal. But the Supreme Court refused to do so and declared that 'as the question is one of law depending on the construction of the relevent section of the Act, it will save time if it is decided by us here and now. It is not disputed that we have the power on hearing of this appeal to decide this question'.

On merits of the case the Supreme Court held that 'there being no proper order of the Appellate Assistant Commissioner on appeal, there could be no appeal to the Tribunal and there could be no order in appeal out of which questions of law could arise to be answered by the High Court. The Supreme Court therefore upheld the refusal of the High Court to answer the reference made to it and dismissed the appeal.

The Supreme Court held the order of the Central Board of Revenue transferring *all* assessment proceedings in connection with the Bidi Supply Company to Ranchi from Calcutta bad in law as the Act under which the order had been issued authorised the transfer of a (pending) case alone. The Board had issued an omnibus order to cover all proceedings which the Income-Tax Act did not authorize.[78]

As explained below, the Supreme Court upheld the validity of the law providing for the realization of arrears of Income-Tax in various States as arrears of land revenue. In Purushotam Govindji Halai's case, the Supreme Court specially upheld the validity of the arrest of the applicant for non-payment of arrears of Income-Tax. Probably encouraged by a change in the composition of the Court, Erimmal Ebrahim Hajee of Cannanore[79] who had been arrested for wilfully withholding the arrears of payment of Tax gambled on the Supreme Court's changing its opinion in the matter. Despite the clear decision of the Supreme Court in Halai's

case, the Madras High Court held the arrest illegal and ordered the release of Hajee. On appeal the Supreme Court followed its earlier judgment in Halai's case and accepted the appeal of the Collector of Malabar. The arrest and detention were held valid as being under a procedure established by a valid law.

In the cross appeals by the Board of Agricultural Income-Tax, Assam and Sindhurani Chaudhri and other landlords of Assam, the Supreme Court on March 24, 1957 quashed the decision of the Assam High Court that Salami paid by a prospective lessee of land to the Zamindar is agricultural income within the meaning of the Assam Agricultural Income-Tax Act. It held that Salami was a capital receipt not liable to agricultural income-tax.[80]

V. Election Appeals

Part XV of the Indian Constitution deals with electoral matters. Article 329 declares that notwithstanding anything contained in the Constitution, the election of a candidate cannot be set aside otherwise than by an election petition presented to an Election Tribunal set up by the Election Commission to decide an election dispute. The Supreme Court held in N. P. Ponnuswami v. Returning Officer, Namakkal and others[81] that the word election as used in Part XV of the Constitution is used to connote the entire process culminating in a candidate's being declared elected.

'Any matter which has the effect of vitiating an election should be brought up at the appropriate stage before an Election Tribunal and should not be brought up at an intermediate stage before any court.' Questioning the rejection of a nomination paper is questioning the election.

But this did not conclude the matter. In Hari Vishnu Kamath v. Syed Ahmed Ishaque and others[82] the Supreme Court reiterated its view that article 329 prohibits the initiation of proceedings for setting aside an election otherwise than by an election petition presented to such authority and in such manner as provided therein. It is the Election Tribunal alone that can decide such disputes.' 'But once that Tribunal has made determination or adjudication on the matter, the power of the Supreme Court to interfere by way of special leave can always be exercised'.

In Durga Shankar Metha v. Thakur Raghuraj Singh[83] the Supreme Court made it still clearer. 'Article 136 of the Constitution vests in the Supreme Court a plenary jurisdiction in the matter of entertaining appeals by granting special leave against any kind of judgment or order made by a court or a tribunal in any cause or matter. This power could be exercised in spite of the specific provision for appeal contained in the Constitution or other laws. Neither article 329 nor the Representation of the People Act can in anyway cut down or affect the overriding powers which the Supreme Court exercises in the matter of granting special leave to appeal.'

The Court had earlier held that on special leaves to appeal it can only quash a decision of a tribunal which has been vested with the power to determine a dispute finally. In election cases this raised a peculiar problem. In Hari Vishnu Kamath v. Syed Ahmed Ishaque[84] an application for a writ of certiorari had been made to the High Court. But the Tribunal that had decided the case was dead . . . To whom could such a writ, if granted, be addressed? Arguing that 'it was the intention of the Constitution to vest in the High Court a power to supervise decisions of tribunals by issue of appropriate writs and directions, the Supreme Court held that 'the exercise of that power cannot be defeated by technical consideration of form and procedure'. The Supreme Court on appeal in this case held that even though the Tribunal was dead, a writ could be issued by the High Court under Article 226 to the relative District Judge or the Chief Judge of the Small Cause Court to whom according to the provisions of the Representation of the People Act, the records of the Election Tribunal had been sent. The High Court had been authorized under article 226 to issue a writ to a court or a person. The person who had the records of the case could be appropriately asked to send them to the High Court which could then, by writ, demolish an order if it considered it without jurisdiction or palpably erroneous.

In Pratap Singh v. Srikrishna Gupta and others,[85] the Supreme Court held that when the legislature has not distinguished between mandatory and directory rules, the judges must determine the matter. It held that using a particular form for the nomination

of a candidate for election as president of the municipality was a directory rule. Its breach could be overlooked provided there is substantial compliance with the rule read as a whole and provided no prejudice ensues. It accepted the appeal.

An applicant in an election dispute does not initiate proceedings before an Election Tribunal. He presents his application to the Election Commission. The Election Commission, if it is satisfied that it is a proper application, sets up a tribunal to hear the application. Among other things, the election petition has to be presented within a prescribed period after the declaration of the result. In Dinabandhu Sahu v. Jadumuni Mangraj and others,[86] the Supreme Court held that the order of the Election Commission accepting an application in spite of the delay in presenting it was final and could not be disturbed by the tribunal. The Commission need not pass a specific order but if it appoints a tribunal for the disposal of the case and sends the application to it for disposal it has to be presumed that it has condoned the delay. The Commission can condone the delay on its own or on representation made by or on behelf of the candidate. When such an application comes before the Election Tribunal 'it cannot be argued that it should not be heard as it was liable to be dismissed for delay in presenting it.'

The application presented may be defective in other ways. If the Election Commission sends it to an Election Tribunal, such defect notwithstanding, it is for the Election Tribunal to decide to proceed further in the matter. If the Election Tribunal, for example, allows time for the necessary verification of corrupt practices to be amended 'the Supreme Court will not interfere'. 'These are not matters in which this court would interfere in appeal made under article 136. The Court does not sit as a court of appeal and does not interfere with findings given on consideration of evidence unless they are perverse or based on no evidence'.

In Jagan Nath v. Jasvant Singh and others[87] the Supreme Court further clarified the law and procedure to be followed by the Election Tribunals. 'The statutory requirements of election law must be strictly observed. The Court possesses no common law powers'. But 'if the special law itself confers authority on the

tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequence of non-compliance with certain procedural requirements laid down by it, the jurisdiction of the tribunal entrusted with the trial of the case is not affected'.

In Sangram Singh v. Election Tribunal, Kotah,[88] the Supreme Court upheld the authority of the High Court to quash the decision of an election tribunal under article 226, after the Tribunal had prevented Sangram Singh from taking part in further cross examination because he had been absent at an earlier hearing and the Tribunal had decided to proceed ex-parte. The Supreme Court held that 'the Tribunal had, in such circumstances, a discretion to allow the respondent to take part in such proceedings on such conditions as it may think fit. If the Tribunal prevents such a respondent from taking part in the proceedings, the Tribunal will be failing to exercise a jurisdiction vested in it by law and the High Court can quash its decision.'

In Khader Sheriff v. Munnuswami Gounder and others,[89] the Supreme Court declared that 'the question when a candidature commences is one of fact and a decision of the tribunal on that question is not liable to be reviewed by this court in special appeal.' It however observed that 'the question when a person becomes a candidate must be decided on the language of section 7a (b) (f) of the Representation of the People Act. Under that section, the candidature commences when the person begins to hold himself out as a prospective candidate.'

In Bhikaji Keshav Joshi and another v. Brij Lal Nandlal Biyani and others[90] and in S. Khadar Sherif v. Munnuswami Gounder and others[91] the Supreme Court was facing a rather intricate question. It held that the enquiry and trials in both the cases had not covered the entire case as made out in the application to set aside the elections. Obviously the Supreme Court could not itself hold this enquiry. The Election Tribunals that had held the original enquiries and trials were both dead. But justice had not been done in the two cases. The Supreme Court, therefore, took an extraordinary step by ordering an executive and administrative authority, the Election Commission, 'to reconstitute an appropriate tribunal

for the purpose,' in S. Khadir Sheriff's case to determine whether the Krishnaswami Karyaulkar entered into the contract with the Government of Travancore-Cochin on behalf of the joint family or for his own personal benefit on a consideration of the evidence on record and in Bhikaji Keshav Joshi's case 'for enquiry and trial with reference only to (1) the allegations in paragraph 6 (a), (b) and (c) of the application and (2) the allegations in paragraphs 1 of item 1 in schdule A attached to the application.'

In Vashisht Narain Sharma v. Dev Chandra and another,[92] it was contended that the finding that the result of election would have been materially affected is a finding of fact which the Supreme Court would not interfere with in special appeal. The Supreme Court however held that 'there is no foundation for the so called finding of fact. The Tribunal misdirected itself in not comprehending that they had to find a fact and proceeded merely upon a mere possibility.' It held that their finding upon the matter is speculative and conjectural' and it quashed it.

In T. C. Basappa v. Nagappa and another,[93] the Election Tribunal had found that 'the bus of Ahmad Jan did carry to the polling booths about 60 voters in two days. In the circumstances of the case, it could be legitimately presumed that the majority of them voted for the respondent No. 1 who had procured the bus. If the votes of at least 40 to 50 of these persons be left out of account as being procured by corrupt practice of the first respondent, his majority of 34 votes would be wiped out and the petitioner, would gain an undisputed majority.' The Supreme Court held that 'the finding of fact is there and there is evidence in support of it. It cannot be said that the Tribunal exceeded its jurisdiction in dealing with the matter' and refused to interfere. In Harishanker Prashad Gupta v. Shibban Lal Saxena[94] the Supreme Court declared that the Mukhia (headman) of a village was a public servant, even though he was not paid by the state, as he was appointed by the District Magistrate. In Mahendra Kumar v. Shrimathi Vidyavati it declared that the contract for printing the electoral rolls was a contract with the Government of the area concerned.

In Surendra Nath Khosala v. S. Dalip Singh[95] the Supreme Court held that where the Election Tribunal has found as a fact

that the persons whose thumb impression the nomination paper purported to bear had really proposed and seconded the candidate and that those thumb impressions had been attested by a magistrate who had been authorised in that behalf, there is no room for the contention in appeal by special leave against the decision of the Election Tribunal that the returning officer was justified in rejecting the nomination paper.

In Harinder Singh v. S. Karnail Singh[96] the Supreme Court held that whether a person who has been previously employed by the candidate on other work should be held to have been employed in connection with election is a question of fact to be decided on the evidence in each case. In the absence of such a finding R. 118 cannot be held to have been infringed.'

In the Chief Commissioner of Ajmer v. Radhey Shyam Dani[97] the Supreme Court held that the electoral roll of the Ajmer Municipality which was authenticated and published by the Chief Commissioner on 8 August 1955 was not in conformity with the provisions of s. 30, sub-s. (2) and the relevant provisions of the Regulation and could not form the basis of any valid elections to be held to the Ajmer Municipal Committee.

The election of the President in 1957 was held before all members of Parliament who had to participate in the election had been themselves elected. The Election Commission ordered elections to be held in March 1957 throughout India. Weather conditions did not, however, permit the elections being held in certain parts of the Punjab where the elections were ordered to be held in June 1957. But the term of office of the President would have been over before the postponed elections could be completed. In compliance with the provisions of the Constitution, the election of the President was held in May so that the new President could assume office before the expiry of the term of office of the president in office. A petition was filed in April, 1957 in the Supreme Court[98] asking it to issue an order for the stay of the election so that members to be elected from the winter-bound constituencies should be able to take part therein. The Supreme Court dismissed the petition principally as being premature. It declared that its function in connection with disputes arising out of an election of the President or the

Vice-President were similar to that of an Election Tribunal which dealt with election disputes after the election was complete and the result of election had been notified in the official Gazette. It further buttressed its position by reference to the provisions of the Constitution[99] which required elections to be held so that a new President was elected before the term of office of the outgoing President expired. It is necessary to remember that the Rules of the Supreme Court framed earlier provided for the filing of election petitions only when the election of the President was complete.[100]

It is arguable that the members deprived of taking part in the election of the President, on account of its being held before the election in the constituencies from which they were standing and were ultimately elected had been completed, could sue the Election Commission for depriving them of their valuable franchise by so fixing dates as to make it impossible for them to participate therein. Luckily the duty of fixing the dates for election is vested in the Election Commission. It is arguable that if it abuses the discretion vested in it by the Constitution, the Supreme Court may hold it liable in a civil action when a citizen claims that he has been adversely affected by its decision. When a municipal election through communal electorates was challenged before the Supreme Court by electors who had taken part in the election so held, the Supreme Court had certainly refused to grant them relief in a writ petition. It had, however, added that they could seek *relief* by *other* appropriate proceedings. It is suggested that the course suggested above forms the appropriate proceedings.

VI. Controller of Housing Accommodation

S. K. Shaw and Brothers were tenants of Rai Brij Raj Krishna. The rent for months of March, April and May 1942 fell into arrears. Though the tenant made two subsequent attempts to pay it, the landlord did not accept the payment. As there was non-payment of rent, the landlords held that the respondents were liable to be evicted. They applied to the House Controller for the eviction of the tenants from the premises. The House Controller on 10 November 1947 directed the eviction of the respondents by 10th May 1948. On appeal the Commissioner upheld the order of the

House Controller. The respondent filed a suit in the Munsif's court at Patna for a declaration that the order of the controller was illegal, ultravires and without jurisdiction. The Munsif dismissed the suit. The subordinate judge upheld the dismissal in appeal. The High Court on appeal reversed the appellate decree of the subordinate judge and held that the order of the rent-controller was without jurisdiction. The Supreme Court on appeal held that Bihar Buildings Control Act 1947 had entrusted the Controller with jurisdiction to determine whether there is no-payment of rent or not as well as the jursidiction to order eviction of a tenant on finding that there is non-payment of rent. His order cannot be questioned in a civil court. The judgment of the High Court was reversed and the decree of the Court below restored.[101]

NOTES

1 Pritam Singh v. The State, 1950 S.C.R. 453.
2 K. Damodaran v. The State of Travancore-Cochin, A. I. R. 1953 S. C. 462.
3 Thakur Prashad v. State of Madhya Pradesh, A.I.R. 1954 S.C. 30. Cf. Chattanatha v. Ramachandra, A.I.R. 1955 S.C. 789.
4 Lachhman Singh and others v. The State, 1952 S.C.R. 839.
5 Virendrajit v. State of Bombay, A.I.R. 1953 S.C. 247.
6 Rameshwar Bhartia v. The State of Assam, 1953 S.C.R. 126.
7 Sadhu Singh v. State of Pepsu, A.I.R. 1954 S.C. 271. Cf. Surinder Singh and others v. Gian Chand and others, A.I.R. 1957 S.C. 875; Mohindra Singh v. State of Punjab, A.I.R. 1956, S.C. 415; Sardul Singh v. State of Bombay, A.I.R. 1957 S.C. 747.
8 Kashmira Singh v. State of Madhya Pradesh, A.I.R. 1952 S.C. 159. Cf. Inder Singh v. State of Pepsu, A.I R. 1955 S.C. 439; Khacheru Singh v. State of U.P., A.I.R. 1956 S.C. 546; Kamala Devi v. Bachulal Gupta, A.I.R. 1957 S.C. 434; Dharman v. State of Punjab, A.I.R. 1957 S.C. 324; Corporation of Calcutta v. Mulchand Agarwala, A.I.R. 1956 S.C. 110; Chikkarange Gowda and others v. State of Mysore, A.I.R. 1956 S.C. 731.
9 Hate Singh v. State of Madhya Bharat, A.I.R. 1953 S.C. 468.
10 Hanumant v. State of Madhya Pradesh, 1952 S.C.R. 1091.
11 Sarwan Singh Rattan Singh v. State of Punjab, A.I.R., 1957 S.C. 637.
12 Mushtak Hussain v. State of Bombay, 1953 S.C.R. 809.

13 Ram Kishen Mithanlal Sharma v. The State of Bombay, 1955 I S.C.R. 1177.
14 Cf. however Ramyed Rai v. State of Bihar, A.I.R. 1957 S.C. 373 where the Supreme Court remanded the case to the Court.
15 Shreekantia Ramayya Munipalli v. State of Bombay, 1955 I S.C.R. 1177.
16 Darshan Singh v. State of Punjab, 1953 S.C.R. 319.
17 Pandurang, Tukia and Bhilia v. State of Hyderabad, 1955 I S.C.R. 1083.
18 Dilip Singh and others v. State of Punjab, A.I.R. 1953 S.C. 364.
19 Aher Raja Khema v. State of Saurashtra, A.I.R. 1956 S.C. 217.
20 H.N. Rishbud and Inder Singh v. State of Delhi, 1955 I S.C.R. 1150.
21 Nanak Chand v. State of Punjab, 1955 I S.C.R. 1201.
22 Nar Singh and Another v. State of Uttar Pradesh, 1955 I S.C.R. 338.
23 Khushal Rao v. State of Bombay, A.I.R. 1958 S.C. 25.
24 Baladin v. State of U.P., A.I.R. 1956 S.C. 181.
25 Kapur Singh v. State of Pepsu, A.I.R. 1956 S.C. 654.
26 Kalavati and others v. State of Himachal Pradesh, 1953 S.C.R. 549.
27 Kuldip Singh v. State of Punjab and Another, 1956 S.C.R. 125.
28 Vemi Reddy Satyanarayan Reddi v. State of Hyderabad, 1956 S.C.R. 247.
29 V. Thevar v. State of Madras, A.I.R. 1957 S.C. 614.
30 Harihar Chakravarti v. State of West Bengal, A.I.R. 1954 S.C. 266.
31 Jangal Prashad v. State of Madhya Pradesh, A.I.R. 1953 S.C. 467.
32 Pushkar Singh v. State of Madhya Bharat, A.I.R. 1953 S.C. 508.
33 Machander v. State of Hyderabad, A.I.R. 1955 S.C. 792.
34 State of Bihar v. M. Homi and Another, A.I.R. 1955 S.C. 478.
35 State of U.P. v. Mohammad Sayyad, A.I.R. 1957 S.C. 587.
36 Nemichand and another v. The Edward Mills Co. and Another, 1953 S.C.R. 197; Cf. S. Rm. Ar. S. Sp. Satappa Chettiyar v. Ramnathan Chettiyar, A.I.R. 1958 S.C. 245.
37 Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji, 1955 II S.C.R. 866.
38 Anderson Wright Ltd. v. Moran and Company, 1955 I S.C.R. 862.
39 Trojan and Co. v. Rm. N. N. Nagappa Chettiyar 1953 S.C.R. 789.
40 Moran Mar Basselios Catholicos and Another v. The Most Rev. Mar Poulose Athanasius and others, 1955 I S.C.R. 520.
41 K. N. Guruswamy v. State of Mysore, 1955 I S.C.R. 305.
42 Ebrahim Vazir Mavat v. State of Bombay, 1954 S.C.R. 933.
43 Sri Sri Sri Kishore Chandra Singh Deo v. Babu Ganesh Prashad Bhagat and others, 1954 S.C.R. 919.
44 Vice-Chancellor, Utkal University v. S. K. Ghosh, 1954 S.C.R. 833, 891.
45 Shiromani Gurdwara Prabhandak Committee, Amritsar v. Raja Shiv Rattan Dev Singh, 1955 II S.C.R. 67.
46 Payyavula Vengamma v. Payyavula Kesanna, A.I.R. 1953 S.C. 21.
47 Bharat Bank Ltd. v. Employees of the Bharat Bank, 1950 S.C.R. 459.
48 Maqbool Hussain v. State of Bombay, 1953 S.C.R. 809.
49 Vishwamitra Press Karyalaya v. Workers of Vishwamitra Press, 1953 S.C.R. 272.
50 Rohtas Industries v. Brijnandan Pandey; A.I.R. 1957 S.C. 1.

51 Indian Iron and Steel Co. v. Their Workmen; A.I.R. 1958 S.C. 130.
52 J. K. Iron and Steel Co. v. Iron and Steel Mazdoor Union; 1955 II S.C.R. 1325
53 Parry and Co. Ltd., v. Commercial Employees Accociation, Madras; 1952 S.C.R. 519.
54 The Lloyds Bank Ltd., v. The Lloyds Bank's Indian Staff Association; A.I.R. 1956 S.C. 746.
55 Newspaper Ltd., v. U. P. State Industrial Tribunal, A.I.R. 1957 S.C. 539.
56 The State of Rajasthan v. The Mewar Textile Mills Ltd., Bhilwara and others, 1954 S.C.R. 1129.
57 Atherton West and Co. v. Suti Mills Mazdoor Union, A.I.R. 1953 S.C. 241.
58 Clerks and Depot Cashiers of the Calcutta Tramways Co. Ltd. v. Calcutta Tramways Co. Ltd., A.I.R. 1957 S.C. 78.
59 The Directors, Barsi Light Railway v. The Employees of Barsi Light Railway, A.I.R. 1957 S.C. 121.
60 Model Mills, etc. Textile Mills Nagpur v. Rashtriya Mill Mazdoor Sangh, 1955 I Lab. L. J. 534. Cf. R. v. Agricultural Land Tribunal for Eastern Province of England, Ex Parte Grant, 1 W.L.R. 1240 (1956). The Court of Appeal here, however, ordered that the Tribunal which had made an erroneous approach to the matter should rehear it.
61 The Workmen of Burn and Co. v. Burn and Co., A.I.R. 1957 S.C. 38.
62 The Crown Aluminium Works, Belur v. Their Workmen, A.I.R. 1958 S.C. 30.
63 Raja Bahadur Motilal Poona Mills Ltd. v. Tukaram Piraji Musale, A.I.R. 1957 S.C. 73.
64 Lakshmi Devi Sugar Mills Ltd. v. Pandit Ram Sarup and others; A.I.R. 1957 S.C. 82.
65 Baroda Borough Municipality v. Its Workmen and others; A.I.R. 1957 S.C. 110.
66 S. S. Shetty v. Bharat Nidhi Ltd; A.I.R. 1958 S.C. 12.
67 Meenakshi Mills Ltd. v. Their Workmen; A.I.R. 1958 S.C. 153.
68 State of U. P. v. Swadeshi Cotton Mills Co.; A.I.R. 1958 S.C. 187.
69 Patna Electricity Supply Co. Ltd. v. Shri Bahram and another; A.I.R. 1958 S.C. 204; Cf. also Hanuman Jute Mills v. Amin Das and another; A.I.R. 1957 S.C. 194.
70 Liquidators of Pursa Ltd. v. The Commissioner of Income-Tax, Bihar; 1954 S.C.R. 767.
71 Sohan Pathak and Sons v. The Commissioner of Income-Tax; 1954 S.C.R. 158.
72 Anglo-French Textile Co. v. Commissioner of Income-Tax, Madras; 1954 S.C.R. 523.
73 Dhakeshwari Cotton Mills v. Commissioner of Income-Tax, West Bengal; 1955 I S.C.R. 941; Cf. Barrs v. British Wool Marketing Board; 1957 S.L.T. 153.

74. Assam Bengal Cement Co. Ltd., v. The Commissioner of Income Tax; 1955 I S.C.R. 972.
75 Commissioner of Excess Profits Tax, West Bengal v. Ruby General Insurance Co. Ltd., A.I.R. 1957 S.C. 669.
76 Raghuvanshi Mills Ltd., Bombay v. The Commissioner of Income-Tax, Bombay; A.I.R. 1953 S.C. 6.
Commissioner of Income Tax West Bengal v. Messrs. Jiwanlal Ltd. Calcutta; A.I.R. 1953 S.C. 473.
77 Commissioner of Income-Tax v. Mtt. Ar. S. Ar. Arunachalam Chettiyar; 1953 S.C.R. 463.
78 Bidi Supply Co. v. The Union of India and others; 1956 S.C.R. 267.
79 Collector of Malavan v. Erimmal Ibrahim Hajee of Connanore; A.I.R. 1957 S.C. 668.
80 Member Board of Agricultural Income Tax, Assam v. Smt. Sindhurani; and Smt. Sindhurani Chaudhurani and others v. State of Assam; A.I.R. 1957 S.C. 729.
81 N. P. Ponnuswami v. Returning Officer, Namakkal and others; I E.L.R. 133 S.C.
Cf. also Mangoo Singh v. Election Tribunal, Barailley and others; A.I.R. 1957 S.C. 871.
82 Hari Vishnu Kamath v. Syed Ahmad Ishaque and others; 1955 I S.C.R. 1104.
83 Durga Shankar Mehta v. Thakur Raghuraj Singh; 1955 I S.C.R. 267.
84 Hari Vishnu Kamath v. Syed Ahmad Ishaque and others; 1955 I S.C.R. 1104.
85 Pratap Singh v. Shrikrishna Gupta and others; A.I.R. 1956 S.C. 140
86 Dinabandhu Sahu v. Jadumoni Mangraj and others; 1955 I S.C.R. 140
87 Jagan Nath v. Jasvant Singh and others; 9 E.L.R. 231 S.C.
88 Sangram Singh v. Election Tribunal, Kotah; 1955 II S.C.R. 1.
89 S. Kadar Sheriff v. Munnuswami Gounder and others; 1955 II S.C.R. 469.
90 Bhikaji Keshav Joshi and another v. Brijlal Nandlal Biyani and others; 1955 II S.C.R. 428.
91 S. Kadar Sheriff v. Munnuswami Gounder and others; 1955 II S.C.R. 469.
92 Vashisht Narain Sharma v. Deo Chandra and another; 1955 I S.C.R. 509.
93 T. C. Basappa v. T. Nagappa and another; 1955 I S.C.R. 250.
94 Harishankar Prasad Gupta v. Shibbanlal Saxena A.I.R. 1956 S.C. 314.
95 Surendra Nath Khosala v. S. Dalip Singh; A.I.R. 1957 S.C. 242.
96 Harinder Singh v. S. Karnail Singh, A.I.R. 1957 S.C. 271.
97 Chief Commissioner of Ajmer v. Radhey Shyam Dani, A.I.R. 1957 S.C. 304.
98 Dr. N. B. Khare v. Election Commission of India; A.I.R. 1958 S.C. 139.
99 Article 62 (1).
100 Supreme Court Rules, Order 37 (a).
101 Rai Brij Raj Krishna and another v. S. K. Shaw and Bros.; 1951 S.C.R. 145.

CHAPTER VI

THE SUPREME COURT & FUNDAMENTAL RIGHTS

1

The Constitution of India grants citizens and residents in India fundamental rights of various kinds. Some of these have been put separately in Part III of the Constitution under the title 'Fundamental Rights'.[1] Several others lie scattered in other parts of the Constitution.[2] So far as the guarantee about their enjoyment is concerned, there is no difference. All of them are justiciable. The "Fundamental" rights however can be more easily secured through the process of writs whereas other rights may have to be defended in courts by other appropriate proceedings.[3] Both categories of rights have the same status in the Constitution. The amendment of the provisions of the Constitution concerning rights is no more difficult if they are 'fundamental' than if they occur outside Part III of the Constitution. Whether the subject matter of a right concerns an item in the State list of subjects or in the Federal list, the Constitution can be amended by Parliament by the same process, a bigger majority than is required for ordinary legislation.[4]

Fundamental rights may formally be divided into two classes: one where the right guaranteed is absolutely secured, the other in which the rights however stated, are subject to limitations. These limitations may be either explicit, i.e. laid down in the Constitution itself, or they may be implicit, i. e. arising out of the possible exercise of these rights by others and by administrative needs. Here the Indian Constitution differs from several other constitutions which guarantee rights. The American Constitution—or for the matter of that, the Russian Constitution—in its Bill of Rights and other allied provisions guarantees rights in the broadest terms possible without hinting that they are subject to any limitations. The American case law however, has circumscribed most of these rights in the name of the 'police power', or the 'soverign rights' of the states or 'powers necessary' for the exercise of authority granted in the constitution to the federal or the state governments.[5]

'The Court has persistenty ruled,' says Dean Meiklejohn 'that freedom of speech may constitutionally be abridged by legislative action. The Court has interpreted the dictum that the Congress shall not abridge freedom of speech by defining the conditions under which such freedom is allowable. Congress, we are told is forbidden to destroy our freedom except where it finds it advisable.'[6] In many cases, the Indian Constitution tries to guarantee rights as they have been interpreted by American Courts.[7] The American Bill of Rights, it is well to remember, guaranteed specified rights against the federal government alone.[8] Judicial interpretation during the last thirty years has, however, now guaranteed most of these rights against the states in very many cases.[9]

The inclusion of fundamental rights could be expected to make legislatures respect them in the laws which they make under the Constitution. But that was not enough, the new State had also inherited the laws in force at the time when the Constitution became operative. The Constitution laid down that all such laws would be void and inoperative to the extent of their repugnancy with the provisions of the Constitution in Part III. The Supreme Court extended this repugnancy to rights defined elsewhere in the Constitution.[10] It should however be remembered that as explained by Seighart the function of fundamental liberties is not to confer immutable rights upon the subjects, a result which cannot be achieved by legal means, but to guarantee that they should not be deprived of them except by due process of law as prescribed by the Constitution.'

2

So far as the rights absolutely guaranteed are concerned, the employment of children below 14 stands banned. The banning of titles may have been construed by some as including outlawing of honours as well. Such expectations have been belied as the President of India confers 'awards' on citizens of India. The ban on the use of the titles earned during the British rule has proved to be a matter of taste, just as has the use of foreign titles or honours. If Sir Homi comes handy to a speaker instead of Shri Modi, there is not much that a government could do about it. The abolition of

'untouchability', prohibition of traffic in human beings and forced labour when contravened, form offences punishable in accordance with law. These five incidentally are rights which prohibit a course of action to citizens and residents in India. A Government comes into the picture only when a contravention of any of these rights by one or more persons is brought to its notice. Not many cases have arisen under this group of provisions except under Article 17, prohibiting 'untouchability'. Offences against this article can however also be brought under article 15.

As the result of the provisions of articles 17, 18, 23 and 24, it may be said that the employment of children below 14 in factories, mines or other hazardous employment has been almost entirely brought to an end. Traffic in human beings and forced labour, to whatever extent these existed when the Constitution was brought into operation, have been almost entirely wiped out. Titles are no longer conferred. Untouchability, however, has offered a tougher battle. It involves the attitude of a large class of citizens against some of their more unfortunate brethren. The state is helping in securing its disappearance and is most anxious to put an end to it.

3

Other rights may be divided into two classes; rights of persons and right to property. The right of persons may again be subdivided into two, 'the first protecting the inner life of the individual citizen' and 'preserving democratic political process', the second assuring the people accused of crime a fair trial. The rights of persons accused of crimes involve limitations on the legislature, the executive and the courts whereas other rights of persons may restrain the legislature and executive alone. It may be noted here that a person includes a 'corporation' as well.[11] But a corporation is not a citizen. Certain rights are available to citizens alone, others to citizens, non-citizens residents in the country and corporations as well.

Some rights are negative in character as they impose restraints on the legislature, the executive and the administration, others may be looked upon as positive as they seem to promise some positive enjoyment.[12] In the second class come cultural and educational

rights of citizens including those of minorities and equality of opportunity. Though equality of opportunity is a positive right, section 16 (2) couples it with restraints on the Government, the legislature and the executive. The rights of accused persons lay down certain fundamental principles of procedure and criminal liability.

Most of the work of the Supreme Court relates to the disposal of cases concerning fundamental rights. This is partly because direct approach to the Supreme Court is permitted if a fundamental right is alleged to be involved.[13] The Supreme Court has, however, held that it will grant relief by writs or other proper remedies only if the facts are either admitted or are taken as proved. If the facts are in dispute, the matter has to be inquired into and decided by proper legal proceeding.[14] Cases involving fundamental rights may also reach the Supreme Court via tribunals or High Courts. A very sensible federal statute now provides that if the question of interpretation of the Constitution is raised in a lower court, it will remit the case to the High Court if the provision in question has not been previously interpreted either by the Supreme Court or the High Court under which the lower court is situated.[15]

The Supreme Court has assumed and exercised supervisory authority in matters of fundamantal rights as in other matters, over courts, tribunals[16], executive authorities required to perform their duties judicially[17], municipalities[18] and district boards[19]. It has examined statutory law, custom[20], rules and regulations[21] bye-laws[22] and delegated legislation[23] as well as exercise of delegated authority.[24] It has gone into orders passed by the Governor[25] or action taken by the President[26], State and central Governments, ministers and executive officers and actions even of private citizens.[27]

The Supreme Court standing at the apex of a single judicial system in the country has not had to meet the sort of obstruction which the Supreme Court in the United States may encounter from the State courts.[28] This naturally makes it difficult for governments of the States in India to refuse to carry out the law as declared by the Supreme Court. As we see elsewhere,[29] the Constitution has been amended seven times during the last eight years; at least six times as a result of the Supreme Court's interpretation of its provisions. To this may partly be attributed by some observers the

absence of open defiance by the executive of a decision of the Supreme Court. Only once had the Supreme Court to rebuke the officers of a State government for their trying to dodge the implication of the Supreme Court's decisions.[80] The arrest of some detenues on the spot after their release had been ordered by the Supreme Court may by others be counted among examples of conflict between the judiciary and the executive.

4

Right to Equality

Probably the most invoked articles of the Constitution have been articles guaranteeing the right to equality (articles 14, 15 and 16)[81]. Very early in its history the Court interpreted article 14 in what it described was not 'a doctrinaire approach. "In construing Artilce 14 of the Constitution we should not adopt a doctrinaire approach which might well choke all beneficial legislation.' 'Article 14 is designed to prevent any person or class of persons from being singled out as a special subject for discriminatory treatment.'[82] But varying needs of various classes may require separate treatment and the State may therefore classify persons for legitimate purposes.[83] Legislation which is based on rational classification is permissible. 'A law applying to a class is constitutional if there is sufficient basis or reason for it.' 'Classification means segregation in classes which have a systematic relation, usually found in common properties or characteristics.[84] 'The classification must, however, be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be attained'[85] and cannot be made 'arbitrarily and without any substantial basis'. If this has been done, 'a statutory discrimination cannot be set aside as the denial of equal protection of the law if any state of facts may necessarily be conceived to justify it.'[86] 'The mere production of inequality by a statute', thus, is not enough by itself to invalidate it, provided it deals equally with the members of a well defined class.[87]

At one time the Supreme Court seemed to hold the view that a classification may not include all persons similarly situated. 'It

was for the legislature to determine what categories it would embrace within the scope of legislation, and merely because certain categories which would stand on the same footing as these which are covered by the legislation are left out, would not render legislation which has been enacted in any manner discriminatory and violative of fundamental right guaranteed by article 14.'[38]. Here we have an echo of the opinion of Justice Hclmes in Patsone v. Pennsylvania in which he had declared that 'it was not essential that the state cover the whole field of possible abuses.' In Budhan Chaudhri and others v. The State of Bihar, however, the article seems to have been more rigidly interpreted. 'To pass the test of permissible classification,' the Supreme Court laid down in the latter case, 'two conditions must be fulfilled, (i) that the classification must be founded on intelligible difference which distinguish persons or things, that are grouped together from others left out of the group, and (ii) that differentia must have a rational relation to the object sought to be achieved by the Act.' Of course, classification may be founded on different basis; namely, geographical, or according to objects or occupation or the like.[39]

The Court has conceded that 'the legislature may not itself make a complete and precise classification of the persons or things to which an Act applied, but may leave the selective application of the law to be made by the executive authority in accordance with the standard indicated or underlying the policy and objects disclosed.'[40] 'A legislature may even merely lay down the law to be applied to persons or things answering a given description or exhibiting certain common characteristics'[41] and being unable to make a precise and complete classification, it may leave to an administrative authority to make a selective application of the law to persons or things within the defined group while indicating in clear terms the underlying policy and purpose in accordance with which or in fulfillment of which the administrative authority is expected to select persons or things brought under operation of the law.[42] It could be argued that such discretion was likely to be abused. The Supreme Court did not disregard this possibility. 'If the discretion has been abused or exercised in disregard of the statute or contrary to the declared policy and object of legislation such exercise can be annulled.'[43]

The Supreme Court has held that an accused on trial can claim that he be not discriminated against not only 'in the substantive law but in procedural law also, to his prejudice, unless he could be assigned to a group by valid classification.' 'Article 14 assures to every one the same rules of evidence and modes of procedure. In other words the same rule must exist for all in similar circumstances.'[44] 'All litigants similarly situated are entitled to avail themselves of the same procedural rights for relief and for defence with the like protection and without discrimination.'[45] This apparently runs counter to the opinion expressed by the Court in Kedar Nath Bajoria v. State of West Bengal that 'an accused is only guaranteed that he would be tried by a special court and under the Act setting up such a procedure if his case falls under the Act setting up such a court. He would have no guarantee that all situated as he is, were not similarly treated.'[46] The Court in pronouncing judgment in various cases had to decide the case before it. It started by holding a trial invalid because the special procedure laid down in the controlling Act was bad as being contrary to the Constitition.[47] Then it went deeper; even though the procedure in its totality offended against equality, if the portion that had been applicable to the case in question had not prejudiced the case for the defence, it held the trial legal.[48] Similarly when excessive and unconstitutional powers conferred on a State Government had not been exercised by the executive, it gave the government credit for its forbearance and held the trial legal.[49]

In deciding the cases concerning special tribunals the Court began by seeking to decide the question of the unreasonableness or arbitrariness of the classification of offences to be tried by special courts under a special procedure by looking for the underlying purpose and policy of the impugned Act 'as disclosed by its title, preamble and provisions.' While deciding the same question in Kathi Raning Rawat v. State of Saurashtra, it invited the Saurashtra Government to file an affidavit explaining the circumstances under which the impugned law was enacted and held the classification reasonable 'in view of the underlying purpose and policy as disclosed by the surrounding circumstances as explained in the affidavit, the title, preamble, provisions of the Statute and the noti-

fication issued under.[50] Here the Court seems to have been influenced by the prevalent state of lawlessness in Saurashtra where serious crime was rampant and where the medieval conditions of an alliance between criminal elements in the population with remnants of feudalism still continued. Between these two approaches there was a lot of difference. In Dhirendra Kumar Mandal v. the Superintendent of Jail and Remembrancer of Legal Affairs to the Government of West Bengal[51] the Supreme Court, however, repelled the suggestion 'that there is any real conflict between the decision in Anwar Ali Sarkar's case and the decision in Saurashtra case or in the case of Kedar Nath Bajoria. As shown elsewhere,[52] the Court showed a progressive tendency towards holding statutes constitutional. It may be said that in deciding a case, the court now takes into consideration not only the provision of the impugned Act, but its application as well. The Saurashtra Public Safety Ordinance and West Bengal Special Courts Act were almost identical in their coverage. In the case before the Court, the Saurashtra Ordinance had not been applied to all cases but to cases involving specified offences. This was held to create a valid classification *in fact* and the trial was held legal.[53] Similarly when, as a matter of fact, it was found that in the course of a trial an accused had not been prejudicially affected, the part of the trial held after the coming into operation of the Constitution when alone he could claim equality before law was held valid.[54] The earlier view of the law may be thus held to have been superseded.

But 'though trial by jury is not guaranteed in the Indian Constitution, the State Government has been empowered to direct that trial of all offences or of any particular class of offences before any court of Sessions shall be by jury in any district.' Having done so, if the State denies to certain individuals the right to be tried by jury while retaining that right in the case of other individuals who have committed the same or similar offences, the notification doing so is bad, unconstitutional and void contravening the provision of article 14 of the Constitution.[55]

In Buddhan Choudhari v. State of Bihar,[56] difference in judicial organization in various States came under challenge. Cases which would ordinarily be tried by a sessions judge in same States and

which may be tried by an additional or assistant sessions judge as well may, in Bihar and some other States, be referred to Section 30 Magistrates. The magistrate decides the case on his own and has no jurors to help him as a sessions judge may have. When a case is so tried, there need have been no committal proceedings disclosing the case for the prosecution. The Supreme Court held that no prejudice was likely to be caused to the accused by such a provision as the Court could send a case for trial in Sessions if it thought it necessary. 'The legislature understanding the needs of its own people',it argued, 'had created a geographical classification which is not unreasonable.' Here the unit of classification was an entire State. But when a part of a State had a law which did not apply in other parts of the State, the Supreme Court refused to countenance discrimination even though the bigger state had been formed only when the Constitution came into effect. It held the Mewar Collection of Rents (in jagirs) Act void as it applied to only a part of the new State of Rajasthan.[57]

As explained elsewhere,[58] the guarantee of equality before law was extended to procedure under taxative statutes. Income-Tax can neither be assessed nor levied under different procedures, one harsher than the other.[59]

Three cases involving single individuals came up before the Court. As explained elsewhere the Sholapur Spinning and Weaving Mill Co., was taken over under government control for mismanagement. This was upheld when it was challenged by a single shareholder under article 14. He was unable to prove that there were other companies similarly situated that had not been similarly dealt with.[60] But when the same legislation was challenged later on, it was declared unconstitutional and void.[61] This put the decision in Sathi Land Restoration Act 1950,[62] and Waliuddawla Succession Act, 1950,[63] at par with this case. Selection of classification to include one single individual or institution may thus be said to have been held unconstitutional.

Frivolous cases were sometimes brought to the Court in the guise of a complaint of denial of equality. The Supreme Court upheld the action of the Government of Andhra subjecting hides and skins to sales tax even when it was claimed that business in

other articles was not so taxed.[64] Two different rates for two types of taxies were similarly challenged but held valid.[65] Without holding it so as a rule of the Court, the Supreme Court suggested that similar punitive consequences should follow non-payment of Income-Tax throughout India. Though the Court repelled the contention that such differences embracing as wide groups as persons in one State, offended against article 14, Justice Chandrasekhar Aiyar made this suggestion probably by way of abundant caution.[66]

An incidental inequality, denial of judicial protection to tenants in eviction or increment of their rents, created by the Bombay Housing Board Act in favour of the government, a local authority or the Housing Board was held justifiable by the Supreme Court. 'Tenants of the Government, local authority or the Board', the Supreme Court declared, 'cannot complain of any denial of equality before the law or of equal protection of the law if they are not provided the same protection as other tenants. It is not to be expected that such bodies would be actuated by the profit-making motive so as to unduly enhance the rent or evict the tenants'.[67]

Article 15 prohibits discrimination between citizens on grounds only, among others, of place of birth. A distinction has been made between discrimination based on place of birth and that on domicile or residence. Admission to Medical College, Indore, of students not resident in the State and seeking admission on their own account, is possible only if they pay a capitation fee in addition to other charges. This was held constitutional.[68] One cannot change one's place of birth, though one can certainly change one's place of residence. Discrimination on the ground of sex only has been prohibited. The U. P. Court of Wards Act permitted the Government to take control of the estate of a female proprietor if, in the opinion of the Government, she was incapable of administering it. This was held unconstitutional because the State was not authorized to take over the properties of male proprietors under similar circumstances.[69] Section 497 of the Indian Penal Code, however, was declared valid even though it punished adultery committed by a man and not a woman. Clause 3 of article 15, it was pointed out, allows special provision for women to be made whether it be

beneficial to them or not.[70] The Supreme Court has held unconstitutional elections to local bodies through communal electorates.[71] Reservation of seats, it was held, could be made for women and members of Scheduled Castes and Scheduled Tribes only. Similarly apportionment of services[72] and admissions to educational institutions[73] between communities was held unconstitutional. An amendment of the Constitution, however, has now made it possible for the government to reserve seats for backward classes in educational institutions.[74]

In deciding cases arising out of the application of article 14, there seems to have developed a sharp difference of opinion among the judges of the Supreme Court. This could be traced partly to some of the judges being concerned more with deciding the case in Court than pronounce upon the constitutionality of the legislation under which action may have been taken or a judgment pronounced. This is best illustrated in the Court's decisions on special courts discussed below.[75] Here division of opinion among the justices appeared early. In Anwar Ali Sarkar's case, Chief Justice Patanjali Sastri alone held the West Bengal Security Act, 1950, valid. Justice Das (as he then was) held only that part of the section 5(1) void which allowed the executive to refer any case to a special court. Justices Mukerjee, Fazl Ali, Mahajan and Chandrasekhara Aiyar held the whole section 5(i) void whereas Justice Bose was of opinion that the whole Act was void.

The Supreme Court in India borrowed the doctrine of classification from the American jurists but did not emphasize the public purpose in the service of which alone Justice Field had held classification constitutional.[76] Nor is the approach of Justice Holmes[77] very much in evidence in the judgments of the Supreme Court in India. 'We start', opined Justice Holmes, 'with the general consideration that a State may classify with reference to the evil to be prevented'. As Justice Bose said in his dissenting opinion in Bidi Supply Co., v. the Union of India, 'to say the governments and legislature may classify is to invest them with a naked and arbitrary power to discriminate as they please'.[78] He harked back to the American tradition of Field and Holmes and would examine the object of classification and permit it only when it was pervaded

by the spirit of a 'public purpose' to serve or the necessity of an 'evil to be prevented'. It must be remembered that here as in the United States, the doctrine of equal protection of laws 'plagues the justices most' for the simple reason that it 'represents a mood rather than a command', 'an attitude of mind, a way of life rather than a precise rule of law'. It is doubtful, however, whether we will get any better results if we leave the question to be decided on the line Justice Bose would have us follow. 'What I am concerned to see', Justice Bose said in Anwar Ali Sarkar's case, 'is whether the collective conscience of the sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unprejudicial views can regard as proper in a democracy we have proclaimed ourselves to be'.[79] This would leave it to the judges to decide every question as they will and they may not all agree.

As the Supreme Court of the United States said in A. F. L. v. American Sash and Door Company, 'equal protection of the laws enshrined in the Constitution is precisely defined neither in history nor in terms. Like all legal provisions without a fixed meaning, it is adaptable to the changes in time. That is its strength; that also makes dubious its appropriateness for judicial enforcement, dubious because their vagueness readily tends itself to make of the Court a third chamber with drastic veto power. Holding democracy in judicial tutelage is not the most promising way to foster disciplined responsibility in a people'.[80]

5

Religious and Cultural Rights

Articles 25 and 26 guarantee freedom of religion. Article 29 which guarantees the conservation of a distinct culture, may also be considered to guarantee religious freedom. Article 29 section 2 provides against denial of admission into state-maintained or state-aided institutions on ground only, among others, of religion and caste. Article 30 grants to religious minorities the right to establish and administer educational institutions of their own and secures

their right to grants-in-aid equally with other classes of citizens. Article 15 prohibits discrimination between citizens on grounds only of religion, race and caste or any of them. It seeks to ensure equal access to all citizens to shops, public restaurants, hotels and places of public entertainment and secure them the use of public wells, roads, public parks, and other similar institutions wholly or partly built out of public funds. When the Madras orders dividing services and admission to goverment institutions among various communities were held void as offending against article 15,[81] sub-section 4 was added thereto to make it possible for the State to make special provisions for the advancement of any socially and educationally backward classes of citizens and for Scheduled Castes and Scheduled Tribes.

India has separate personal laws and customary laws for various communities. Apparently this goes against artice 15(1) as creating discrimination based on religion alone. On the same grounds, separate legislation for the control of the property owned by institution of one religion or dealing with citizens differently as members of various religions or religious denominations could be argued to offend against article 15. It was held, however, that the Constitution accepted this distinction by implication when it made personal law of its citizens a subject of legislation by the Union and the States.[82] Prohibition of bigamy among Hindus alone,[83] the setting up of machinery for the control of Hindu Religious Endowments[84] and not that of other religious communities were thus held valid. Parliament has now enacted separate laws of succession, marriage and inheritance for the Hindus.

Section 21 of the Madras Hindu Religious and Charitable Endowments Act, 1951, was held ultra vires because it empowered the Commissioner (appointed under the Act) and his subordinates to enter the premises of any religious institutions or places of worship.[85] This was held to be interference with the fundamental rights guaranteed under articles 25 and 26.

Similarly sections 38 and 39 and the proviso to section 46 of the Orissa Hindu Religious Endowments Act, 1939, as amended in 1952, were held ultra vires because they vested the right to frame a scheme for the administration of endowed property in the Commis-

sioner of Hindu Religious Endowments who is a mere administrator or executive officer. The Commissioner's right to restrict by directions the spending of surplus funds of the endowment for purposes of the trust was also held unconstitutional.[86]

The Bombay Public Trusts Act, 1950, was also similarly attacked. Section 44 which allowed the Charity Commissioner to be appointed a trustee for all public trusts including religious trusts was held invalid so far as religious trusts were concerned. Clauses 3 to 6 of section 47 were held invalid to the extent that they empowered a court to appoint a Charity Commissioner as a Trustee of any public trust not excluding religious institutions. Clause 3 of section 45 and corresponding provisions in section 56(1) were struck down because they allowed the Charity Commissioner or the Court to divert funds of religious trusts for purposes considered expedient or proper by the Court or the Charity Commissioner, although they could be spent on original purposes. All this was construed as an unwarranted encroachment on the freedom of religious institutions with regard to the management of their religious affairs.

But compulsory registration of all charitable trusts, including religious trusts, was upheld. The State was permitted to charge a fee of Rs. 25 from every trust even though it was claimed in one case that the income of the trust could be spent only for religious purposes. The requirement that the trusts should keep their accounts in the prescribed form was also upheld.[87]

Article 26 makes it a fundamental right of a religious denomination to administer its properties in accordance with law. But the law must leave such administration to religious denomination subject to such restrictions or regulations as it might choose to impose. A law which takes away administration altogether and vests it in any other authority, would amount to a violation of fundamental rights under clause (b) of article 26.[88]

The guarantee that grants-in-aid to an institution cannot be withheld for religious or linguistic reasons alone secures that such institutions will not be starved for lack of state aid;[89] these grants are not for the promotion or maintenance of religion.

The Supreme Court conceded that the succession to Mahantship

of a math or religious institution, including therein any rule of succession laid down by the founder of the institution, is a religious right.[90]

Article 29(1) guarantees 'to any section of citizens having a distinct language, script or culture of its own' the right to conserve it. Article 30(1) allows a minority, whether based on language or religion, the right to maintain educational institutions of its own choice. 'The right to impart instruction in their own institutions to the children of their own community in their own language' was held implicit in it. When orders of the Bombay Government threatened the maintenance of schools conducted by the Anglo-Indian community by refusing them grants if they admitted sons of parents whose mother tongue was not English, the Supreme Court held them unconstitutional, largely in defence of the rights of citizens at large. 'Article 29(2) guarantees to all citizens, whether they belong to majority or minority, the right of admission into educational institutions maintained or aided by the State. It is a right which an individual citizen can claim as a citizen and not as a member of any community or class of citizens'. He cannot be refused admission mainly for reasons of language only. The Bombay Education Circular was struck down as denying to children, the mother tongue of whose parents was not English, admission into schools where English was medium of instruction. The 'police' right of the State to define the medium of instruction for children in its schools was held, if it existed at all, to be subordinate to the fundamental rights of the citizens. 'However laudable the object of the circular may be in that it provided for better and more effective education to children in their mother tongue, admission to students could not be denied for reasons of language alone. The reference to the language of the parents made it a discrimination based on language only.'[91]

Some other matters included in the chapter may be said to emphasize the secular nature of the State. The State is restrained from levying taxes for the promotion or maintenance of any religion.[92] Religious education is banned in State institutions except when the State has taken over the administration of a trust originally established for, among other things, religious education.[93] Aided

or recognized institutions similarly cannot compel any person to attend religious education in their premises.[94]

While specific charges on Hindu religious or charitable trusts, even though intended to pay a part of the expenses incurred by the State for their proper management, were held unconstitutional[95] as taxes because the proceeds were credited to the consolidated fund of the State, payments from out of the consolidated fund towards the State's securing that these properties are properly managed were held to be lawful payment as they were not taken to be payments for the promotion or maintenance of religion.[96]

6

Five Freedoms

Article 19 guarantees to citizens freedom of speech and expression, freedom of movement throughout India and the right to reside and settle in any part thereof, the right to form associations or unions, the right to assemble peaceably and without arms, to practice any profession or to carry on any occupation, trade or business and to acquire, hold and dispose of property. The last two rights are connected with other provisions of the Constitution as well and will therefore be considered separately elsewhere.

Article 19 makes a distinction between citizens and persons. Its provisions apply to citizens alone. This keeps out the corporations; they are persons no doubt but not citizens.[97] Even citizens can claim these rights only when they have not lost them under a valid law. A convict undergoing a sentence of imprisonment passed by a competent court or a detenue detained under a detention order cannot lay claim to such rights he may have lost on account of such order unless he challenges the legislation under which he has been deprived of his personal liberty as directly affecting his rights and being beyond permissible restrictions on them.[98] This has the effect of allowing the State to keep a detenue under preventive detention without having to justify such detention under article 19.[99] The criminal and civil law of the country, outside the realm directly covered by these rights, is similarly beyond challenge under article 19.[100]

Article 19 has been amended once. The First Amendment to the Constitution Act made the amending provisions retrospective. But before the amendment became operative on 18 June 1951 several cases had come to the Supreme Court involving an interpretation of the article in its original form. As explained below[101] the amendment was necessitated by the fear of consequences of a judgment of the Supreme Court interpreting article 19.

The article 19(2) puts restrictions on the rights guaranteed in article 19(1). The right to assemble is subject to reasonable restrictions in the interest of public order, the right to form associations or unions to similar restrictions in the interest of public order or morality, and right to move freely and reside and settle in any part of India to reasonable restrictions in the interest of general public or for the protection of the interests of the Scheduled Tribes. Freedom of speech and expression could originally be restricted by laws relating to contempt of court, defamation, matters offending against decency or morality or matters undermining the security of or attempting to overthrow the State. This left to the courts only the right of determining whether the restriction had been imposed by a law relating to permissible grounds. Whatever the scope of the law, the Supreme Court had only to find whether it fell under one of the accepted categories; if it did not, it was unconstitutional; if it did, it was constitutional. Thus it was held that precensorship of news in the interest of public order could not be a law relating to matters undermining the security or tending to overthrow the State.[102] Restrictions on the entry into the State of Madras of any document banned for similar reasons were struck down.[103] The High Courts of Patna[104] and Punjab[105] taking their cue from the decision of the Supreme Court in Romesh Thapper v. State of Madras, held void the Press Emergency Powers Act, 1931. The High Court of Punjab held Section 124 of I.P.C. relating to sedition unconstitutional. The State did not appeal. Rather curiously freedom of speech was invoked against the provision in the Labour Disputes Appellate Tribunal Act 1950 laying down that industrial peace should not be disturbed so long as an industrial dispute was pending in the court in appeal. The Supreme Court rightly rejected the plea.[106]

The decision of the Patna High Court held, though wrongly, that incitement to violence was not a matter relating to the security of the State, nor did it tend to overthrow the State. Here the State appealed and the Supreme Court held that such an interpretation of its judgment was not correct. The Supreme Court declared that though the restrictions imposed by section 4(1-A) of the Indian Press (Emergency Powers) Act on freedom of speech and expression are solely directed against undermining of the security of the State or to the overthrow of it, incitement to violence under certain circumstances did undermine the security of the State.[107]

The article as amended, subjects freedom of thought and expression not to restrictions but, as in the case of other rights, to reasonable restrictions. This widens the scope of justiciability of the impugned law. Against this must be off-set the fact that the scope of the restrictions has now been redefined to include friendly relations with foreign States, public order and incitement to commit an offence.

In State of Bihar v. Shailabala Devi[108] the Supreme Court refused to take seriously a pamphlet certain parts of which in the opinion of Patna High Court contemplated a bloody and violent revolution. 'Such writings leave their readers cold and nobody takes them seriously. Any non-descript person who promises to change the order of things by bloody revolution and assumes the role of a new Messiah is merely the laughing stock of his readers and creates an adverse impression against himself, rather than succeed in striking up any excitement in the minds of the readers.' 'To punish a wholly ineffectual use of words merely because it was intended that they should contribute to the possibility of some harm would amount to punishing an intent to attempt a crime as opposed to the attempt itself.' 'Rhetoric of this kind might in conceivable circumstances inflame passions as, for example, if addressed to an excited mob, but if such exceptional circumstances exist, it was for the State Government to establish the fact'. 'The time is long past when writings of this kind can in normal circumstances excite people to commit crimes of violence or murder or tend to excite anybody to commit acts of violence.' Justice Mahajan for the

Court was here adopting the basic concept of Holmes-Brandeis dissent that an individual should not be punished for his utterances unless these utterances are likely to have some effect on the existing structure. This dissent became the judgment of the Supreme Court in U.S.A. in 1927. But as Professor Cushman demonstrates in his *Civil Liberties Today*, the Vinson Court in deciding cases under the Smith Act, drastically modified, if it did not in fact abandon, the traditional test of clear and present danger.

'In order to determine whether a particular document falls within the ambit of any of the clauses of Section 4(1),' the Supreme Court declared, 'the writing has to be considered as a whole and in a fair and free and liberal spirit not dwelling too much upon isolated passages or upon strong word here and there. An endeavour should be made to gather the general effect which the whole composition would have on the mind of the public. Expressions which are the stock-in-trade of political demagogue and exaggerations in language cannot lead to that result'. Thus freedom of speech and expression may be said to be guaranteed to citizens so long as a speech or writing interpreted as a whole, in a fair, free and liberal spirit does not, as a matter of fact, lead to prohibited results i.e. does not for example actually disturb public order or incite readers or listeners to commit an offence.

The State of Punjab passed an Act in 1956 authorizing pre-censorship of news and banning entry of objectionable literature and prohibiting newspapers from publishing news or writing about certain matters when such entry or publication may be likely to disturb public peace apparently arguing that the earlier decision of the Supreme Court holding precensorship void was now bad law as the scope of restrictions had now been extended to cover matters relating to public order and incitement to commit an offence. In Virendra v. State of Punjab the banning of the entry of newspapers was held unconstitutional on 8 September 1957. This was because the ban was unlimited in time. The Punjab Government promptly amended the Act so as to make the first order run for 3 months. But in Narendra v. State of Punjab the orders of the Government of Punjab prohibiting the editor of Pratap from publishing any news

about or comments on Hindi agitation was held constitutional.[109] The Court seemed to imply that it was for the executive to decide when it was necessary to place temporary restriction on newspapers in the interest of public order or for preventing incitement to commit an offence. The Supreme Court found another argument in support of its decision in that the aggrieved party could appeal to the State against the order. In the instant case the power to prohibit publication of the news had been exercised by an officer to whom the Govetnment had, in accordance with the provisions of the Act, delegated it. The Supreme Court held the delegation valid. It had been asserted in the arguments at bar that the power had been abused. The Supreme Court did not go into the question. This reasoning if followed to its logical conclusions would put an end to the liberty of the press when a legislature was so misguided as to arm the executive with such wide powers. The Supreme Court declared that it was wholly unsuited to determine the time or the extent to which restrictions on the press should be imposed.

Speeches or writings which merely tend to excite disaffection towards the government have been held to form a permissible exercise of the right to freedom of speech or expression and section 124A of I.P.C. held invalid to the extent to which it invades this right.[110] However, banning of writings or speeches tending to bring into hatred or contempt the government established by law has been held to form a reasonable restriction in the interest of public order.[111] The provisions of the Press (Emergency Powers) Act, 1931, requiring the securing of a permit from the District Magistrate for publishing and distributing a news-sheet have been held to be an unauthorized invasion of the freedom of expression.[112] Bombay orders banning publication of advertisements for the sale of liquor[113] and Rules under Madras Police Act, banning publication of news on horse betting[114] were held invalid as not coming under permissible grounds for restriction of the right of free expression. In deciding the case of Ramjilal Modi, the Supreme Court held in April 1957 section 295A, I.P.C. valid. 'Section 295A does not penalize any and every act of insult or attempt to insult the religion or religious belief of a class of citizens but it penalizes only those acts of insults or varieties of attempts to insult the religion or

religious belief of a class of citizens which are perpetrated with the deliberate intention of outraging the religious feelings of that class. The calculated tendency of this aggravated form of insult is clearly to disrupt the public order. The section which penalizes such activities is well within the protection of clause 2, of articles 19 as being a law imposing reasonable restrictions on freedom of speech and expression.[115] In the United States, freedom of speech and expression came to be described as a preferred freedom in the forties, occupying a special place in a democratic government. 'An interference with the civil rights of citizens', it has been said, 'works not only to his disadvantage but also to the disadvantage of the public as a whole; for it denies to the body politic the benefit of the participation of the individual in the formation of ideas.' In Thornhill v. Alabama,[116] the United States Supreme Court had, in 1940, indicated that despite a clear contrary legislative intent, a defendant could successfully raise as a defence the possibility of an unconstitutional application to another of a statute which by its terms abridges civil liberties even though the statute could not be constitutionally applied to him. Similarly injunctions may partly issue for reasons which would not constitutionally justify restraints.

The law of contempt of court also restricts freedom of speech and expression. Reasonable restrictions may be imposed on the right of free speech and free expression with regard to contempt of court. But the courts of record in India have claimed, in the British tradition, the inherent right to punish for contempt which, it has been argued, would have been upheld even if it had not been provided for in the Constitution.[117] Under its power of judicial supervision and control over all other courts in India, the Supreme Court has considerably rationalized the law. It has admitted appeals against the decisions of the High Courts even where they had taken action in cases involving their own contempt committed during the course of a trial.[118] We have for the first time in our legal history one law of contempt throughout India.

Two cases directly involving contempt of the Supreme Court arose during the last eight years. The Times of India in Bombay felt the Bombay tradition of a double bar seriously assaulted by a

decision of the Supreme Court which held that, the bar in the High Courts rules notwithstanding, an advocate of the Supreme Court could practise at the original side of a High Court. Its advocacy of a double bar outran its discretion and in an editorial it assailed the decision of the Supreme Court as being inspired by an-to it-improper desire to establish a single bar in the country. The Supreme Court committed him for contempt for imputing an improper motive to the Court but when the accused tendered an apology, it accepted it and let the matter rest there.[119] In re Hiralal Dikshit and others the Supreme Court held Hiralal Dikshit guilty of contempt for distributing, during the pendency of a case, a leaflet declaring that judges of the Supreme Court may fall a victim to the blandishments of the executive and conceivably might not decide a case—particularly the case then in Court (?)—strictly for judicial and legal reasons alone. The contemner was sentenced to a fortnight's simple imprisonment.[120]

In an appeal by special leave, the Supreme Court went into the case of M. Y. Sharif and Dr. Kathalay, advocates of the Nagpur High Court who were accused of contempt of the Court of a judge of the High Court in that they had asked the Chief Justice to transfer the case of their client to another bench as their client did not expect a fair trial from the presiding justice. In the High Court, the lawyers had justified their conduct by declaring that they had only carried out the instructions of their client and that such applications were made almost as matters of routine in the Nagpur High Court. The Court, while apparently recognizing that such improper behaviour was almost customary, convicted the lawyers in order to put a stop to such practices and fined them for their aggravating their offence by contumaciously arguing that it was justifiable. In appeal in the Supreme Court the lawyers seem to have been better advised and offered sincere apologies for their conduct. The Supreme Court sent the case back to the High Court which however refused to accept their apologies. In appeal the Supreme Court quashed the sentence and accepted the apology tendered by the appellants. They observed that offering defence in a contempt may not always be regarded contumacy.[121] In Shiv Narain Jafar v. Judges of the Allahabad High Court,[122] the Supreme

Court reversed the orders of the High Court suspending the appellant from practice for six months and let him off with a warning.

The executive committee of the Bar Association at Muzaffar Nagar passed a resolution against two judicial officers and sent copies of the resolution to the District Magistrate and asked him to give them an appointment to lay their grievances against the judicial officer before him. When this was done, contempt proceedings were started against the lawyers. The Supreme Court held that the lawyers had not committed contempt of any court; they were interested in the proper administration of justice. Their conduct throughout proved that they had no intention of obstructing the course of justice or influencing improperly its administration in any particular case or in a particular court. It set aside the conviction and quashed the sentences passed on them. The Supreme Court held that defaming a judge did not necessarily scandalize a court.[123] This obviously over-ruled the decision of the Supreme Court in B. R. Reddy v. Madras wherein the Court had held that the defamation of a court amounts to contempt of court for which the aggrieved officer may start proceedings under the Contempt of Court Act even though other remedy may be open to him.

As the Supreme Court has interpreted the law, contempt of court proceedings are likely to restrain freedom of speech and expression only if such speech or expression is directed towards prejudicing a fair and just consideration of a case before a court at the time when such freedom is exercised or when its exercise so scandalizes a court as to shake public confidence in obtaining impartial justice therein. Fair criticism offered with a view to obtaining reforms in law and procedure stands immune. The Court has further indicated that the law of contempt is not to be used in a vindictive spirit—as it was so used, for example, by Chief Justice Young at Lahore,[124]—but for the purpose of safeguarding the citadel of justice so as to keep it functioning in the service of impartial administration of justice. It has suggested that offering a defence of one's conduct may not always aggravate the offence. As the Court said in Brahma Prakash Sharma v. State of U. P.[125],

'The reflection on the conduct or character of a Judge in reference to the discharge of his judicial duties would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created'. 'When attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to contempt of court. The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it a contempt.' 'A defamatory attack on a judge may be libel so far as the judge is concerned and it would be open to him to proceed against the libellor in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt."

7

Freedom of Association

The right to assemble and freedom to form associations and unions go together.[126] The Constitution of the United States does not guarantee the right to form association. Professor Robert A. Horn in his stimulating volume on *Groups and the Constitution* traces the recognition of this right in the constitutional history of the United States to the point where it has been now acknowledged 'a fundamental right'. But as Prof. Cushman shows in his *Civil Liberties Today*, even though the Supreme Court of California held a State statute prohibiting use of public buildings to subversive groups, when such use was permitted to other civil groups, void, the use of public buildings is being currently denied by public authorities to groups regarded as controversial.

Unless citizens can come together (peacefully and without arms) they cannot effectively form association or unions. The right is subject to reasonable restrictions for maintaining public order. In Madras v. V. G. Row,[127] the provisions of the Madras Criminal

Law Amendment Act, 1908, as amended in 1953, were declared void so far as they authorized the government to declare an association unlawful leading to the forfeiture of its property, without giving its members or office-bearers a fair opportunity of rebutting the charges and subjecting the government order to judicial scrutiny. Here the punitive and procedural provisions of the Act seem to have been held bad. The impugned law authorized the State Government to declare an association unlawful on certain specified grounds notified in the official Gazette. Its office-bearers and members could, within a fixed period, make a representation to the State Government in respect of the notification. After the expiry of the period allowed for making representation to the Government, it was to place its own order and the representations in respect thereto before an advisory board. If the board thought it necessary, it could call for further information from the State Government or the office-bearers of the condemned associations and in the light of all the material decide whether there was or was not sufficient cause for penalizing the association. If it decided that the order was not justified the State Government had to cancel it. The Supreme Court declared that the right to form associations or unions has wide and varied scope for its exercise. Its curtailment is fraught with potential reactions in the religious, political and economic fields. The vesting of authority in the executive government to impose restrictions on such a right without allowing the grounds of such imposition to be duly tested in a judicial inquiry may be viewed as reasonable only in very exceptional circumstances and within the narrowest limit. In the present case such circumstances were held to be absent and the permissible limits held to have been transgressed.

8

Freedom of Movement

Free movement from one State to another is protected. Article 19(1)(d) provides 'a guarantee against unfair discrimination in the matter as a protection against parochialism'.[128] 'The purpose of the article 19(1)(d) is that there shall be no State

barriers.' Freedom of movement is subject to reasonable restrictions in the interests of general public or protection of any scheduled tribe. 'If restrictions are sought to be put upon the movement of a person from State to State or even within a State such restriction will have to be tested with the permissive limits prescribed.' 'The interests of public may be of various kinds. This may be connected with the avoidance of pestilence or spreading of contagious diseases, certain places may be kept closed for military purposes and there may be prohibition of entry into areas which are actual or potential war zones or where disturbance of some kind or another prevails. In the interests and for the benefit of the scheduled tribes law may be made restricting the ordinary right of citizens to go or settle in particular area' so that they may not be 'imposed upon by shrewd or designing persons'.

The Supreme Court held in Dr. N. B. Khare v. State of Delhi that a non-resident may be externed for a short period from an area by an executive order for reasons communicated to him.[129] The externment period may be extended when there is a provision for the externee to make representations against the order, even though they are to be considered by an advisory board only, but only when the authorising Act itself is to expire soon (by August 1951). As explained elsewhere[130], the externment of a resident under City of Bombay Police Act, has been similarly held valid.

9

Freedom to Reside and Settle

Article 19(1)(e) guarantees the right to reside and settle in any part of India subject to reasonable restriction as on freedom of movement. The Supreme Court held in Ebrahim Vazir v. State of Bombay, that a citizen could not be denied the right of entry—and therefore of residence or settlement—in India for a mere breach of the permit regulations or upon a reasonable suspicion of having committed such a breach under the Influx From Pakistan (Control) Act, 1949.[131] It was held that the refusal of entry into his own country to a citizen because he was suspected to have been an intending evacuee was not a reasonable restriction on his right, i.e.,

was not justified by the objective that the impugned Act had in view. It may be added that the very fact that the appellant was a citizen was in dispute. The State claimed that by his conduct the appellant had renounced his citizenship, the defence implied that the act of returning to India proclaimed that renunciation was not final or complete. The Court seems to have taken the view that renunciation was only suspected and had not been found and proved and therefore deprivation of citizenship and of the right to settle or reside in India was not justified.

NOTES

1 Part III, Constitution of India.
2 Articles 265, 301, 302, 303, 304, 325, 326.
3 Cf. Article 32 fundamental rights. Questions arising out of other articles reach the Court in Appeal under articles 132, 133, 134, 136.
4 Articles 368 gives no 'preferred' position to the Articles guaranteeing rights.
5 Cf. Constitution of U.S.A., annotated and edited by Corwin and published by the authority of the Senate, articles with editor's notes.
6 *Free Speech and its Relation to Self Government*, 20.
7 Commissioner H. R. E. Madras v. Laxmindra Tirtha Swamiar, 1954 S.C.R. 1028.
8 Cf. Amendments to the Constitution.
9 Cf. Corwin *op. cit.*
10 Cf. Supreme Court decisions cited above and below.
11 General Clauses Act.
12 Articles 14, 15, 16, 18, 20, 21, 22, 27, 28, 30(2), 31 form the first group. Articles 17, 19, 23, 24, 25, 26, 29, 30(1), 32 form the second group.
13 Article 32.
14 Code of Civil and Criminal Procedure (Amendment) Act 1951. (Act XXIV of 1951).
15 Articles 132, 133, 134.
16 Article 136.
17 Ujjagar Singh v. State of Punjab, 1952 S.C.R. 756; State of Bombay v. Parushottam Jog Naik, 1952 S.C.R. 674; Dattatreya Moreshwar Pangarkar v. State of Bombay and others 1952 S.C.R. 612.
18 Rashid Ahmad v. Municipal Board Kairana, 1950 S.C.R. 566; Mohammad Yasin v. The Town Area Committee, Jalalabad and Another, 1952 S.C.R. 572.
19 Shrimati Hiradevi v. District Board, Shahajahanpur, 1952 S.C.R. 1122; Tahir Hussain v. Dist. Board, Muzaffarnagar, A.I.R. 1954 S.C. 630.
20 Ram Dhan Lal v. Radhe Sham and others, 1951 S.C.R. 370; Tikait Harigobind Prasad Singh v. Shrimaty Phaldani Kumari 1952 S.C.R.

153; Saraswati Ammal v. Jagadambal and Another, 1953 S.C.R. 939; Trojan and Co. Ltd. v. Nagappa, 1953 S.C.R. 789; Kura v. Jog Ram, A.I.R. 1954 S.C. 269; Audh Behari v. Gajadhar, 1955 I S.C.R. 70; Gokul Chand v. Parvin Kumari, 1952 S.C.R. 231; Mahant Salig Ram v. Mst. Maya Devi, 1955 I S.C.R. 1191.

21 Babul Chandra v. Chief Justice and Judges, A.I.R. 1954 S.C. 524; Thakur Raghubir Singh v. Court of Wards, Ajmer and Another, 1953 S.C.R. 1049; Satish Chandra Anand v. The Union of India, 1953 S.C.R. 655; State of M.P. v. G. C. Mandawar, 1955 I S.C.R. 599; Habeeb Mohamed v. The State of Hyderabad and others, 1953 S.C.R. 661; Syed Quasim Razvi v. State of Hyderabad and others, 1953 S.C.R. 589.

22 Rashid Ahmad v. Municipal Board, Kairana, 1950 S.C.R. 566; Mohammad Yasin v. The Town Area Committee, Jalalabad, 1952 S.C.R. 572; Tahir Hussain v. District Board, Muzaffarnagar. A.I.R. 1954 S.C. 630.

23 In re. The Delhi Laws Act 1912, etc. 1951 S.C.R. 747; State of Bihar v. Maharajadhiraj Sir Kameshwar Singh of Darbhanga and others, 1952 S.C.R. 889; Raja Surya Pal Singh v. State of U.P. and another, 1952 S.C.R. 1056; Kathi Raning Rawat v. State of Saurashtra, 1952 S.C.R. 435; Harishanker Bagla v. State of M.P., 1955 I S.C.R. 380; Rajnarain Singh v. Chairman P.A. Committee, 1955 I S.C.R. 290.

24 State of Bombay v. Purushottam Jog Naik, 1952 S.C.R. 674.

25 Ujjagar Singh v. State of Punjab, 1952 S.C.R. 756; State of Bombay v. Purushottam Jog Naik, 1952 S.C.R. 674.

26 Madhya Pradesh Sales Tax Act assented to by the President.

27 Shrimati Vidya Verma v. Dr. Shiv Narain Verma, 1955 I S.C.R. 983.

28 Article 141, "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

29 Cf. above, chapter XV The Supreme Court and Amendment of the Constitution.

30 Chamber of Commerce, Hapur and Three others v. State of Uttar Pradesh, 1955 I S.C.R. 848.

31 Article 14, 15, 16,—

14) The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15) (1):—The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2):—No citizen, shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to = = =

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public.

(3):—Nothing in this article shall prevent the State from making any special provision for women and children.

(4):—Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

16) (1):—There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2):—No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.

(3):—Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4):—Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5):—Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

32 Dhirendra Kumar Mandal v. Superintendent and Remembrancer of Legal Affairs, West Bengal, 1955 I S.C.R. 224.

33 (a) Chiranjit Lal Chaudhari v. The Union of India and others, 1950 S.C.R. 869.

(b) State of M.P. v. G. C. Mandawar, 1955 I S.C.R. 599.

(c) V. M. Syed Mohammed and Co. v. State of Andhra, 1954 S.C.R. 1117.

(d) Ebrahim Vazir v. State of Bombay, 1954 S.C.R. 933.

(e) Rao Shiv Bahadur Singh and another v. The State of Vindhya Pradesh, 1953 S.C.R. 1188.

(f) M. K. Gopalan v. State of M.P., 1955 I S.C.R. 168.

(g) Raja Kulkarni v. State of Bombay, 1954 S.C R. 384.

(h) State of Punjab v. Ajaib Singh, 1953 S.C.R. 254.

(i) Satish Chandra Anand v. The Union of India, 1953 S.C.R. 655.

(j) Suraj Mal Motha and Co. v. A.V. Vishwanatha Sastri, 1955 I S.C.R. 448.

34 Suraj Mal Motha and Co. v. A. V. Vishwanath Shastri and another, 1955 I S.C.R. 448.

35 Dhirendra Kumar Mandal v. Superintendent and Remembrancer of Legal Affairs, West Bengal, 1955 I S.C.R. 224.

36 Harman Singh v. Regional Transport Authority Calcutta, ; 1954 S.C.R. 371.

37 Suraj Mal Mohta and Co. v. A. V. Vishwanath Shastri and another, 1955 I S.C.R. 448.
38 Sakhawat Ali v. The State of Orissa, 1955, I S.C.R, 1004.
39 Buddhan Chaudhri and others, v. State of Bihar, 1955 I S.C.R. 1049.
40 (a) Suraj Mal Mohta and Co. v. A. V. Visvanath Sastri, 1955 I S.C.R. 448.
(b) State of West Bengal v. Anwar Ali Sarkar, 1952 S.C.R. 284.
(c) The State of Bombay v. F. N. Balsara, 1951 S.C.R. 682.
41 Kedar Nath Bajoria v. The State of West Bengal, 1954 S.C.R. 30.
42 Ibid., 41-42.
43 Ibid., 47.
44 Kathi Raning Rawat v. State of Saurashtra, 1952 S.C.R. 435.
45 Direndra Kumar Mandal v. The Superintendent and Remembrancer of Legal Affairs, 1955 I ¡S.C.R. 224.
46 Cf. Stare Decisis and the Supreme Court, Chapter XII.
47 Suraj Mal Mohta and Co. v. A. V. Viswanatha Sastri, 1955 I S.C.R. 448.
48 Shree Meenakshi Mills Ltd. Madurai v. Shri A. V. Vishwanath Shastri, 1955 I S.C.R. 787.
49 Kedar Nath Bajoria v. State of West Bengal, 1954 S.C.R. 30.
50 Kathi Raning Rawat v. State of Saurashtra, 1952 S.C.R. 435.
51 Dhirendra Kumar Mandal v. The Superintendent aad Remembrancer of Legal Affairs, 1955 I S.C.R. 224.
52 See—Stare Decisis, Chapter XII.
53 Buddhan Chaudhry v. State of Bihar, 1955 I S.C.R. 1045.
54 Cf. Chapter XIV The Supreme Court and Parliament.
55 1955, I S.C.R 448, FF 787, ff 796 ff.
56 Buddhan Chaudhari v. State of Bihar, 1955 I S.C.R. 1045.
57 State of Rajasthan v. Rao Manohar Singh; 1954 S.C.R. 996.
58 Cf. Chapter XII Stare Decisis and the Supreme Court.
59 Suraj Mal Mohta and Co. v. A. V. Viswanath Sastri, 1955 I S.C.R. 448.
60 Charanjit Lal Chaudhri v. Union of India, 1950 S.C.R. 869.
61 Dwarkadas Srinivasa Moraraka v. Sholapur, Spinning and Weaving Co., 1954 S.C.R. 674.
62 Ram Prasad Narayan Sahi v. State of Bihar and Orissa, 1953 S.C.R. 1129.
63 Ameerunnissa Begum and others v. Mahboob Begum and others, 1953 S.C.R. 404.
64 V. M. Syed Mohammad and Co. v. State of Andhra, 1954 S.C.R. 1117.
Cf. however the decision of the English Court of appeal in Regina v. Plintshire County Licensing, exparte Banet, 1957 2 W.L.R. 90.
Here the Court rebuked the committee for pursuing consistency at the expence of the merit of the individual cases.
65 Harman Singh v. Regional Transport Authority 1954, S.C.R. 371.
66 Cf. the judgment of Chandrasekhar Aiyar J. in Purushottam Govindji Halai v. B. M. Desai and others, 1955 2 S.C.R. 887.
67 Baburao Shantaram More v. Bombay Housing Board and Another, 1954 S.C.R. 572.

68 D. P. Joshi v. State of Madhya Bharat, 1955 I S.C.R. 1215.
69 Rajeswari Devi v. State of U.P. A.I.R. 1954 All 608.
70 Yusuf Abdul Aziz v. State of Bombay, 1954 S.C.R. 930.
71 Nain Sukh Das v. State of Uttar Pradesh, 1953 S.C.R. 1184.
72 Venkataraman v. State of Madras, A.I.R. 1951 S,C. 229.
73 State of Madras v. Champakam Dorairajan, 1951 S.C.R. 225.
74 The Constitution (First Amendment) Act, 1951 Section 2.
75 See—Stare Decisis, Chapter XII.
76 Justice Field in Barbier v. Connolly, 113 U.S. 27 (1885).
77 Justice Holmes in Patsone v. Pennsylvania 232 U S. 138, 1914.
78 Justice Bose in Bidi Supply Co. v. Union of India and others 1956 S.C.R. 267.
79 Justice Bose in State of West Bengal v. Anwar Ali Sarkar 1952 S.C.R. 284.
80 A. F. L. v. American Sash and Door Company, 335-45, 538, 555, 557, 1949.
81 (a) State of Madras v. Shrimati Champakam Dorairajan, 1951 S.C.R. 225.
(b) Venkataraman v. State of Madras, A.I.R. 1951 S.C. 229.
82 Seventh Schedule; List II, Concurrent List; Item 28 "Charities and charitable institutions, charitable and religious endowments and religions and religious institutions".
83 State of Bombay v. Narasu Appa A.I.R. 1952 Bom. Item 84.
84 (a) Commr. H. R. E. Madras v. Lakshmindra Tirth Swamiar 1954 S.C.R. 1005.
(b) Mahant Sri Jagannath v. State of Orissa, 1954 S.C.R. 1046.
(c) Ratilal Panchand Gandhi v. State of Bombay, 1954 S.C.R. 1055.
85 Commr. H.R.E. Madras v. L. T. Swamiar, 1954 S.C.R. 1005.
86 Mahant Sri Jagannath v. State of Orissa, 1954 S.C.R. 1046.
87 R. Panchand Gandhi v. State of Bombay, 1954 S.C.R. 1055.
88 Article 26—"Subject to public order, morality and health every religious denomination or any section thereof shall have the right.
(b) to manage its own affairs in matters of religion.
89 Article 30(2).
90 Sital Das v. Sant Ram, A I.R. 1954 S.C. 606.
91 State of Bombay v. Bombay Education Society, 1955 I S.C.R. 568.
92 Article 27: No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.
93 Article 28 (1) and (2):—
(1) No religious instruction shall be provided in any educational institution wholly maintained out of state funds.
(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

94 Article 28 (3) :—No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or if such person is a minor, his guardian has given consent thereto.

95 Commissioner Hindu Religious Endowment v. L. T. Swamiar, 1954 S.C.R 1005.

96 Mahant Sri Jaganath and State of Orissa, 1954 S.C.R. 1046.
Cf. Everson v. Board of Education of Ewing Temp. [330 U.S.I. (1947)] where payment of tax funds for transportation of students to or from Roman Catholic School was held valid as being a payment for the benefit of the individual student.

97 General Clauses Act.

98 Nabhirajiah D. K. v. The State of Mysore and others, 1952 S.C.R. 744; A. K. Gopalan v. State of Madras, 1950 S.C.R. 88. The State of Bombay v. Bhanji Munji and Another, 1955 I S.C.R. 777.

99 Article 19.

100 Article 22.

101 Chapter XV.

102 Brij Bhushan and another v. The State of Delhi, 1950 S.C.R. 605.

103 Romesh Thapper v. The State of Madras, 1950 S.C.R. 594.

104 In the matter of Bharati Press, A.I.R. 1951 Pat. 12.

105 Amar Nath v. State of Punjab; A.I.R. 1951 Punjab 18.

106 Raja Kulkarni v. State of Bombay; 1954 S.C.R. 384.

107 State of Bihar v. Shailabala Devi, 1952 S.C.R. 654.

108 Ibid 659-660.

109 Virendra v. State of Punjab; A.I R. 1957 S.C. 896.

110 Tara Singh v. State of Punjab; 1951 S.C.R. 729.

111 Romesh Thapper v. State of Madras, 1950 S.C.R. 594.

112 Rama Shankar v. State, A.I.R. 1954 All 562.

113 Fram Nusserwanji v. Bombay, A.I.R. 1951 Bom. 210.

114 In re Venugopal, A.I.R. 1954 Mad. 901.

115 Ramjilal Modi v. State of U.P., A.I.R. 1957 S.C. 620.

116 Thornhill v. Alabama, U.S.A., 1940, 310 U.S. 88, cf. *Leading Constitutional Decisions*, pp. 124, 127.

117 Bathina Ramakrishna Reddy v. The State of Madras, 1952 S.C.R. 425 ; Rizwan-UI- Hasan and Another v. State of U.P., 1953 S.C R. 581.

118 H. P. Singh v. Thakur Prasad Tewari and Another, A.I.R. 1953 S.C. 436.

119 In the matter of the Editor, Printer and Publisher 'Times of India' (Daily), 1953 S.C.R. 215.

120 Hiralal Dikshit and Another, v. State of U.P., 1951 S.C.R. 677.

121 M. Y. Shareff and Another v. Hon'ble Judges of Nagpur High Court and others, 1955 I S.C.R. 757.
Cf. the decision of the Court of Appeals in G.J.J., a solicitor, where the respondent had given as his motive for alleged contempt the

protection, as here; of his clients. The Court of Appeals debarred him for 3 years. *British Journal of Administrative Law*, Spring, 1957, page 108.

122 Shiv Narain Jaffar v. Judges of the High Court of Allahabad; A.I.R. 1953 S.C. 369.

123 Brahma Prakash Sharma and others v. State of U.P., 1953 S.C.R. 1169.

124 Contempt of Courts Act 1926, Harikishan Lal v. Crown, 1937 I.L.R. 18 Lahore, 69.

In the matter of K. L. Gauba, 1942, I.L.R. 23, Lahore, 411.

He ordered that Lala Harikishan Lal be imprisoned for contempt indefinitely. The Government of India amended the Act under which the sentence had been passed so as to provide that the maximum sentence under it would run for six months. The Law Member declared in the Assembly that till this order was passed, all High Courts had taken the Act to authorise punishment for six months only. In another case, he sentenced Lala Harikishan Lal's son Mr. K. L. Gauba, for contempt for publishing a book. The contemner was not allowed to lead evidence to prove that the facts contained in the book which reprinted the copy of a petition to the crown to investigate affairs connected with the Lahore High Court were true but the judgment proceeded to assert, on the basis of the personal knowledge which two of the three judges forming the bench declared they possessed about their action, that the allegations were not true. The Law Member promised an inquiry into the law of contempt when the question was raised in the Indian legislature.

125 Brahma Prakash Sharma and others, v. State of U.P., 1953 S.C.R. 1178 to 1180.

126 Article 19.

127 State of Madras v. V. G. Row, 1952 S.C.R. 597.

128 Justice Das in A. K. Gopalan v. State of Madras, 1950 S.C.R. 88.

129 Dr. N. B. Khare v. State of Delhi, 1950 S.C.R. 519.

130 See—Stare Decisis. Chap. XII.

131 Ebrahim Vazir Mavat v. State of Bombay, 1954 S.C.R. 933.

CHAPTER VII

FUNDAMENTAL RIGHTS

II

SIXTH AND SEVENTH FREEDOMS

(1)

Practising a Profession and Following a Trade

Article 19(6) authorizes the state to prescribe professional or technical qualifications necessary for practising any profession. The State is also authorized, in the interest of the general public, to impose reasonable restrictions on the right to practise a profession. In Babul Chandra v. Chief Justice and Judges of Patna High Court[1], the Supreme Court held valid—in the interest of the general public—the authority vested in a High Court by the Indian Bar Councils Act, 1926 to refuse, in its discretion, the right to practise as an advocate—to an otherwise qualified lawyer. The rules of Patna High Court do not make any provision for giving notice to the applicant before rejecting his application. The Supreme Court argued that the rules did not say that no notice was to be given. As a matter of fact, it found that the appellant had been given an opportunity to explain his case. The Court held that the High Court had not acted against dictates of natural justice in deciding the case. When in Manaklal Advocate v. Dr. Premchand Singhvi, the Supreme Court found that both the Tribunal and the High Court had made concurrent findings of fact against the appellant holding him guilty of professional misconduct, it refused to re-examine the finding of fact. In Lalit Mohan Das v. Advocate-General, Orissa it was repeated that 'the Supreme Court is usually reluctant to interfere with the orders of the High Court in respect to the disciplinary action to be taken against a member of the Bar who had been guilty of professional misconduct'. However in view of two mitigating circumstances in the case, namely that the Munsif recommended suspension of

practice for one year only and that the legal practitioner had filed a written apology, the punishment imposed by the High Court was held to have erred on the side of excess.' The Supreme Court reduced the period of suspension from five to two years.[2]

Like the right to practise a profession, the allied right to carry on a trade, business or occupation is subject to reasonable restrictions in public interest. It stands guaranteed, not only among fundamental rights but in article 286 where freedom of trade and commerce is guaranteed. When an amendment to the Constitution created an exception making state monopoly of a trade or business possible, the Supreme Court suggested that this, by itself, might not completely destroy the right of a citizen to freely pursue a trade or carry on a business guaranteed by article 226. The seventh amendment to the Constitution has now amended article 226 suitably thus providing for an exception in favour of state monopoly of a trade or business.

The State exercises the right to lay down restrictions in this field in several ways. The Supreme Court has held that, the guarantee of freedom to engage in a business or trade notwithstanding, a citizen cannot claim a right to sell intoxicating drinks or for the matter of that other dangerous or obnoxious preparations or to engage in trafficking in women. These activities are prima facie not in public interest. The case in Court concerned only the right of the State to subject trade and business in intoxicants to restrictions by allowing it to be sold only through authorized dealers who were granted monopoly of trade in particular areas. The Court, however, expressed the opinion that even prohibiting trade in such articles may be regarded as subjecting it to reasonable restrictions in public interest.[3] The Court cited with approval the judgment of Justice Field in Crowley v. Christensen[4] in which it was held that the police power of the State is fully competent to regulate such business including its suppression.

The second group of cases related to the supply of articles essential to the life of the community. These included foodstuffs, fuel, building materials, cotton and textiles, particularly when they were in short supply. Here public interest was interpreted to require that they be made reasonably available for all citizens. All

measures which contributed to secure this result—control of imports, exports, distribution and regulation of supply and price are in public interest and restrictions related to securing that objective have been held reasonable and therefore permissible. The Rajasthan Food Grain Order, 1949 issued under the Essential Supplies (Temporary Powers) Act, 1946 was held valid so far as freezing of stocks, measures to secure equitable distribution and making foodstuffs available at fair prices were concerned.[5] The U.P. Coal Control Order was, however, held invalid as it vested very wide discretionary powers in licensing officers to grant, refuse to grant, discontinue or cancel permits for the sale and distribution of coal.[6] The authority vested in the Governor of Punjab to disallow movement of essential supplies outside Punjab to Pakistan was also upheld.[7] In Madhya Bharat Cotton Association v. The Union of India,[8] it was held that the notification under the Cotton Control Order, 1950, made under the Essential Supplies (Temporary Powers) Act, 1946 giving the right to make 'hedge contracts' to the members of the East India Cotton Association alone was in public interest as hedging protected cotton growers, merchants and textile manufacturers.

In Bijay Cotton Mills Ltd. and others v. State of Ajmer[9] the validity of the Minimum Wages Act, 1948, was impugned as being unreasonable and arbitrary. The Court held that the securing of a living wage to labourers is certainly conducive to the general interests of the public as contemplated in article 19. This necessitates fixing of minimum wages involving restraints on the freedom of contract of employers and workers. Such restraints are reasonable in public interest and therefore valid. The Court went into the procedure devised for fixing the minimum wages and held that these provisions constituted an adequate safeguard against hasty or capricious decisions. The procedure required that the appropriate government before fixing the wages must take into consideration the advice of an advisory committee, if any, and the representations of the affected parties. There is also a central Advisory Board advising the government in the matter.

An interesting case of a 'business' was that of a proprietor of a bus stand at Tanjore. He claimed that the Regional Transport

Authority was preventing him from carrying on the business of providing a bus stand—what he got out of it was not clear—by not allowing the public buses to pick up or set down passengers from the stand he had provided. The Supreme Court held that the right to select the stand wherefrom passengers were to be picked up was vested in the Regional Transport Authority by rules made under the Motor Vehicles Act, 1939, and even if its exercise put a restriction on the business of the appellant, it was a reasonable restriction.[10] The Regional Authority had changed the stand in the interest of the convenience of the travelling public after giving due notice to the appellant and the municipality and hearing both. The Regional Transport Authority had earlier failed twice in its attempt to clothe its decision in a legal form. Eventually the rule under which it had contended it was acting was amended by the Government. Even then the first notice proceedings had to be dropped for fear that the Authority would not succeed in establishing its elaborate case against the appellant. A second notice had to be issued.

The Central Provinces Regulation of Manufacture of Bidis Act, 1948, empowered a deputy commissioner to prohibit the manufacture of bidis in specified villages during the agricultural season. 'Though the object of the Act was to supply adequate agricultural labour during the bidi-manufacturing season, it prohibited altogether the manufacture of bidis even by outside non-agricultural labour which could not have been available for agricultural purposes. It prevented the employment even of residents of the villages who were incapable of serving as agricultural labourers. The statute as it stands prohibits persons who have no connection or relation to agricultural operations from engaging themselves in bidi making and thus earning their livelihood.' It was held invalid.[11]

The attempt of the Kairana municipality to set up a single wholesale market in vegetables within the municipal areas—and thus preventing other than its nominee to carry on wholesale business in vegetables—was struck down as unauthorized by the municipal bye-laws,[12] which required that the business could only be carried on under a licence from the municipality. The muni-

cipality had granted a licence to one individual without framing any rules for the grant of licences.

In Bhatnagar and Co. Ltd. v. Union of India,[13] the Supreme Court conceded that it would be idle to suggest that there should be unfettered, unrestricted freedom of export and import or that the policy of the Government in regard to export and import should be fixed and not changed according to the requirements of the country.

(2)

Right to Property

The right to acquire, hold or dispose of property is guaranteed to every citizen under article 19(1)(f). It can be reasonably restricted by Parliament or legislatures in the interest of Scheduled Tribes or the general public. Article 31(1) provides that no person shall be deprived of his property save by authority of law. These provisions have been held to mean that the executive alone can neither impose restrictions on the right of citizen to hold property nor deprive a person of his property. For both purposes legislative authorization is necessary.[14] In Sadhu Ram v. Custodian General of Evacuee Property,[15] the Supreme Court held that the provisions of the East Punjab Evacuee Property Act requiring confirmation by the Custodian General of all transfers of property in East Punjab was in the nature of a restriction on the right of property but a reasonable restriction at that. This was so even where the law was deemed to apply to transactions retrospectively. Article 31(2) provides in part that property can be acquired or requisitioned for a public purpose as opposed to a private and an individual purpose. Acquisition of arrears of rent of the Zamindars of Bihar whose lands had been acquired by the State was held to have not been acquired for a public purpose.[16] Justice Mahajan seems to have argued that even if it had not been provided for in the Constitution, acquisition as an expression of the right of eminent domain would have been justified for a public purpose only.[17] This is a point of doubtful validity. His authorities deal with cases where positive law does not vest the right of acquisition in the State.[18] When it does so, as it does in India, the omission of

public purpose from the provision need not have made acquisition for other purposes unconstitutional.

In Jagannath Behra v. Harihar Singh,[19] the Supreme Court held that imposing reasonable restrictions in the interests of tenants on the right of a landlord to acquire and hold and dispose of his property did not offend against article 19(5). It further held, that notwithstanding the nature of the guarantees or assurances given to an ex-ruler in an agreement with him, his rights in land could not be absolute but would only go extensive with the right guaranteed to the citizens of the Union under article 19(1)(f) of the Constitution.

The public purpose of article 31(2) and the interest of the general public of article 19(5) seem to cover some common ground. It has been held that all purposes of the Union Government or of the Government of the States are public purposes.[20] To provide accommodation for a member of a foreign consulate is also a public purpose.[21] To acquire land compulsorily for the purpose of enabling a public utility concern to provide quarters for its employees in Bombay has been held valid.[22] To provide accommodation for the homeless is a public purpose.[23] Land laws of various States extinguishing proprietory rights in land so as to redistribute the land among cultivating peasants were also held constitutional as involving a public purpose.[24] In Motipur Zamindari Co. Ltd. v. the State of Bihar, it was held that the Bihar Land Reforms Act, 1950, applied to limited companies as well.[25] 'The purpose behind the Act (Bihar Land Reforms Act, 1950) is to bring about a reform in the land distribution system (ownership of land) of Bihar for the general benefit of the community. The purpose is in accordance with the letter and spirit of the Constitution. The phrase public purpose has to be construed according to the spirit of times in which particular legislation is enacted and, so construed, the acquisition of estates has to be held to have been made for a puplic purpose.' Providing living accommodation for public servants was held to be a public purpose.[26] 'The general interest of the community is directly and vitally concerned with the efficiency of the Government servants because it would be to its benefit to have such servants and, therefore,

providing living accommodation for them was a public propose.' [27]

Acquisition or requisition of property to facilitate the coming into existence of utilitarian institutions, or schemes, having public welfare at heart has been held valid in the interests of the general public even though such action may benefit a section of the community only.[28]

Article 31(2) at first provided that when property was compulsorily acquired, the law authorizing it should either fix the amount of compensation or specify the principles on which it was determined. It seems to have left the question of the compensation to be paid to the legislature. The Supreme Court, however, held that it was justiciable whether the amount paid or determined to be paid did, or did not, constitute compensation i.e. a just equivalent of the property acquired.[29] This almost rendered the provisions of article 31(2) nugatory. What purpose would the fixation of the amount by legislature serve if it could be challenged in court? Its only effect may have been to make two laws in effect, one for the rich who may challenge the compensation so fixed in courts in the hope that compensation would be increased and another for the poor who may have to be content with the compensation fixed by law because they could not afford to challenge it. Just compensation in the United States has usually implied market value. But in U.S. v. Cors,[30] a rise in market value due to government's own special need was excluded. Special or peculiar value to the owner was excluded in U.S. v. Miller.[31] In U.S. ex rel T. V. A. v. Powelson [32] value was measured not by the existing use of the land but by the potential use of and reasonable probability in a reasonably near future.

A temporary taking is permitted in the United States. In such a case incidental damages may also be allowed.[33] If the government and the owner agree upon the price the owner is not entitled to anything higher even when the contract price is less than just compensation.[34]

As said elsewhere [35] the article has now been amended to provide that the compensation fixed by the legislature outright or by laying down the principle for determining it would not be questioned in any court of law.

Apart from the quantum of compensation two other questions were agitated in the Court, property and its acquisition. The Supreme Court laid down that property protected against acquisition or deprivation did not mean physical property alone; it extended it to concrete as well as abstract rights of property,[36] 'those well recognized types of interests which have the insignia or characteristics of property'—including, it would seem, the right of a Mahant to hold his office as the head and superior of a religious fraternity. In State of West Bengal v. Subodh Gopal Bose[37] property was defined as a bundle of rights which the owner can exercise and enjoy over such things to the exclusion of others. In T. K. Trust v. Commissioner of Income-tax it was held that 'property' signifies every possible interest which a person can acquire, hold and enjoy. 'Business' would undoubtedly be 'property'. The Orissa Hindu Religious Endowment Act, 1939, and the Bombay Public Trusts Act, 1950, were held invalid in part on account of the State's acquiring some of the rights making up the bundle.[38] The Sholapur Spinning and Weaving Mills Ordinance, 1950, and the consequential Act were held invalid because vital and substantial rights in the mill had been acquired without compensation.[39] It was, however, held that rights to constitute property must be capable of being held.[40] In the United States it has been held that 'property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private owners, a servitude has been acquired either by agreement or in course of time'.[41]

The arrears of rent due from tenants were held to be a property apart from the land for which the arrears were due in the State of Bihar v. Maharajadhiraja Sir Kameshwar Singh and their acquisition adjudicated separately.[42] In Amar Singh v. the Custodian General of Evacuee Property[43] it was asserted that the view expressed by Justice Bose[44] that the deprivation of any individual right out of a bundle of rights constituting concrete property may be deprivation of property which would require the authorisation of law is a view which was not shared by other members of the Court in that decision.

Evacuee Property quasi-permanently allotted to an allottee was held to be not property as it could neither be acquired nor

disposed of.[45] A valid order cancelling an allotment was, therefore, held to constitute neither deprivation of property nor acquisition thereof.

The right to hold property is subject to reasonable restrictions in public interest as well as in the interest of Scheduled Tribes. If property stands for a bundle of rights, it may be argued that reasonable restriction on the bundle may extinguish one or more of those rights in whole or in part. One could very well ask then whether this would or would not become acquisition or requisition of property depriving the owner thereof. It was held, however, that to fix rent of buildings or lands judicially[46] and prohibit sale of intoxicating drinks except under specified considerations were reasonable restrictions[47] on the right to hold property. 'The fundamental right to enjoy property', it has been said, 'imports only a right to recover reasonable rent. A legislation whose object is to fix equitable rent cannot be said to invade that right'. The Bihar State Management of Estate and Tenures Act, 1949 was held to place reasonable restrictions on the same right even though it took away the power of management from the proprietors and vested it in managers appointed by the State.[48] Similarly when the Bengal Land Revenue Sales Amendment Act, 1950 took away the right to avoid under-tenures in a land, bought at public auction following non-payment of a part or whole of land revenue, it was held to be justifiable deprivation, as having been balanced by the right given to the purchaser to enhance the rent.[49] In Charanjit Lal Chaudhari v. Union of India[50] it was held that when a share-holder continued to possess the right of transferring or selling his share, he was not deprived of his property even though some of his rights arising out of the possession of the share—election of directors, directing how the business of company was to be managed by resolutions at shareholders meetings—had been abridged. Apparently these were restrictions, and reasonable restrictions at that, in public interest, on his right to hold his property. But in Dwarkadas Srinivas v. The Sholapur Spinning and Weaving Mill, the Sholapur Spinning and Weaving Mill Ordinance and Sholapur Spinning and Weaving Mill Act were held unconstitutional as depriving the shareholders of their property.[51] In Saghir

Ahmad v. State of U.P. it was held that the U.P. Road Transport Act, 1951 was invalid to the extent that it deprived, without compensation, the petitioners of their property, namely their right to ply motor vehicles for gain, an interest in a commercial undertaking.[52]

Reverting to reasonable restrictions in public interest on the right to hold property, we find that the Supreme Court held unconstitutional provisions of the Bombay Prohibition Act, 1950 so far as they prohibited possession of medicinal preparations and toilet articles,[53] apparently because public interest did not demand this prohibition. Restrictions on the Mahants of Hindu Maths were similarly held void when they authorized the Commissioner of Endowments, Madras to direct a Mahant how to spend his surplus income—even when it could be spent for purposes of the Math—or make the Mahant credit personl gifts to the income of the Maths.[54] They were not reasonable and in public interest as they made it impossible for him to discharge his functions efficiently. Provisions of the Orissa Hindu Religious Endowment Act, 1939 authorizing the Commissioner of Religious Endowments to frame a scheme for the management of a Math and enforce it on his own were held as arbitrary restriction and therefore invalid.[55] Similarly provisions of the Bombay Public Trust Act, 1950 were struck down so far as they allowed the Charity Commissioner to divert funds to other charitable or religious purposes when he found that the carrying out of the original objects was not desirable or expedient wholly or in parts, even though the Act provided that the Commissioner could act only with the approval of the Court.[56] The Supreme Court held that to divert funds when the original purposes of the trust could be carried out was not reasonable.

Imposition of restrictions, when arbitrarily imposed, on the right to manage one's property were struck down in several other cases. Ajmer Tenancy and Land Records Act, 1950, authorised the Deputy Commissioner to place the property of a landlord under the Court of Wards if he was satisfied that the landlord habitually infringed the rights of his tenants. This was held arbitrary and hence unconstitutional.[57]

The right to dispose of property is restricted in some parts of

India by the law of pre-emption. Originally it was a part of Muslim personal law but by now it has become a part of customary law in several parts of India. The law imposes a limitation or disability upon the ownership of property to the extent that it restricts the owner's unfettered right of sale and compells him to sell the property to his co-sharer or neighbour as the case may be. The benefit and burden run with the land and can be enforced by or against the owner of the land for the time being. The Supreme Court refused to hold these customary restrictions unreasonable.[58]

The definition of property, acquisition of property and payment of compensation as they stood in the Constitution as adopted in 1950 are now matters of historical interest only. The first, fourth and sixth amendments to the Constitution have made most of the decisions of the Supreme Court on the subject redundent. As mentioned earlier, compensation for a property acquired is now a matter for the legislature alone to settle. The right of Courts of law—including the Supreme Court—to have a say in the matter has been now ousted. The definition of property as a bundle of rights has been greatly affected so far as the payment of compensation is concerned by the definition of requisition, acquisition, taking possession of and deprivation of property in the Constitution itself.

'When a law', so runs article 31 (2-A), 'does not provide for the transfer of ownership or right to possession of any property by the State or to a corporation owned and controlled by the State, it shall not be deemed to provide for compulsory acquisition or requisition of property, notwithstanding that it deprives any person of his property.'

'(I) Notwithstanding anything contained in article 13, no law providing for (a) the acquisition by the State of any estate or any rights therein or the extinguishment or modification of any such rights, or (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or (d) the extinguishment or modification of any

rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of share-holders thereof, or (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of searching for, or winning any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31."

Various amendments specially provide protection to certain provincial or State Acts against challenge in court. The Supreme Court has held that it could strike down provisions, even in protected legislation if they were colourable pieces of legislation and beyond the power conferred by the enacting authority.[59]

NOTES

1 Babul Chandra v. Chief Justice and Judges (of Patna High Court), A.I.R. 1954 S.C. 524.
2 Mulchand v. Mukund, A.I.R. 1952 Bombay 296; Manaklal Advocate v. Dr. Premchand Singhvi, A.I.R. 1957 S.C. 425; Lalit Mohan Das v. Advocate General, Orissa, 1957 S.C. 250.
3 Cooverjee v. Excise Commissioner, 1954 S.C.R. 873.
Cf. *The Constitution of the United States*, 919.
4 Crowley v. Christensen, 1890, 34 Law Ed. 620.
5 State of Rajasthan v. Nath Mal, 1954 S.C.R. 982.
6 Messrs Dwarka Prasad Laxmi Narain v. State of U.P. 1954 S.C.R. 803.
7 Darshan Singh v. State of Punjab, 1953 S.C.R. 319.
8 M. B. Cotton Association v. Union of India, A.I.R. 1954 S.C. 634.
9 Bijay Cotton Mills Ltd. and others v. State of Ajmer, 1955 I S.C.R. 752.
10 R. M. Seshadri v. Regional Transport Authority Tanjore, 1955 I S.C.R. 686.
11 Chintaman Rao v. State of Madhya Pradesh, 1950 S.C.R. 759.
12 Rashid Ahmed v. Municipal Board, Kairana, 1950 S.C.R. 566.
13 Bhatnagar & Co. Ltd. v. The Union of India, A.I.R. 1957 S.C. 478.
14 Dwarakadas Shrinivas v. The Sholapur Spinning and Weaving Co. Ltd. and others 1954 S.C.R. 725.
15 Sadhu Ram v. Custodian General of Evacuee Property, A.I.R. 1956 S.C. 43.
16 State of Bihar v. Kameshwar Singh, 1952 S.C.R. 942.
17 Mahajan J. in State of Bihar v. Kameshwar Singh, 1952 S.C.R. 935.
18 Ibid.

19 A.I.R. 1958, S.C. 239.
20 State of Bihar v. Kameshwar Singh, 1952 S.C.R. 940.
21 State of Bombay v. Ali Gulshan, 1955 I S.C.R. 867.
22 State of Bombay v. R. S. Nanji, 1956 S.C.R. 18.
23 State of Bombay v. Bhanji Munji, 1955 I S.C.R. 777.
24 Ibid.
25 Motipur Zamindari Co. Ltd. v. State of Bihar, A.I.R. 1953 S.C. 320.
26 State of Bihar v. Sir Kameshwar Singh, 1952 S.C.R. 941-942.
27 Cf. *Constitution of the U.S.A.*, p. 1065.
28 State of Bombay v. R. S. Nanji, 1956 S.C.R. 26.
29 K. C. G. Narayan Deo v. State of Orissa, 1954 S.C.R. 1.
30 U.S. v. Cors, U.S. 332 (1949).
31 U.S. v. Miller, 317 U.S. 369 (1943). Cf. Dumbould, 100.
32 U.S. ex-rel. T. V. A. v. Powelson, 390 U.S. 276 (1943).
33 U.S. v. General Motors Corporation, 323 U.S. 373, 381-83 (1945).
34 Alprechet v. U.S., 329 U.S. 599 (1947).
35 Cf. below The Supreme Court and the Amendments to the Constitution.
36 The Commissioner Hindu Religious Endowments, Madras v. Laxmindra Tirtha Swamiar, 1954 S.C.R. 1005.
37 State of West Bengal v. Subodh Gopal Bose 1954 S.C.R. 587.
38 Mahant Sri Jagannath v. State of Orissa, 1954 S.C.R. 1046; Ratilal Panachand Gandhi v. State of Bombay, 1954 S.C.R. 1055.
39 Dwarkadas Shrinivas Morarka v. The Sholapur Spinning and Weaving Co. Ltd., 1954 S.C.R. 674.
40 State of Bihar v. Maharajadhiraja Sir Kameshwar Singh,1952 S.C.R. 944.
41 U.S. v. Dickinson, 331 U.S. 745. (1947).
42 State of Bihar v. Maharajadhiraja Sir Kameshwar Singh, 1952 S.C.R. 944.
43 A.I.R. 1957 S.C. 600.
44 1954 S.C.R. 675.
45 A.I.R. 1957 S.C. 599.
46 Shri Kishan Singh and others v. The State of Rajasthan, 1955 II S.C.R. 537-538;
47 Cooverjee v. Excise Commissioner, 1954 S.C.R. 881.
48 State of Bihar v. Maharajadhiraja Sir Kameshwar Singh, 1952 S.C.R. 889.
49 State of West Bengal v. Subodh Gopal Bose and Others, 1954 S.C.R. 587.
50 Charanjit Lal Chaudhari v. Union of India, 1950 S.C.R. 869.
51 Dwarkadas Srinivas Morarka v. The Sholapur Spinning and Weaving Co., Ltd., 1952 S.C.R. 675.
52 Saghir Ahmed v. State of U.P., 1955 I S.C.R. 707.
53 State of Bombay v. F. N. Balsara, 1951 S.C.R. 682; Behram Khurshad Pesikaka v. State of Bombay, 1955 I S.C.R. 613.
54 Commissioner, Hindu Religious Endowments v. Laxmindra Tirtha Swamiar, 1954 S.C.R 1005.
55 Mahant Sri Jagannath v. State of Orissa, 1954 S.C.R. 1046.
56 Ratilal Panachand Gandhi v. State of Bombay, 1954 S.C.R. 1055.
57 Thakur Raghubir Singh v. Court of Wards, Ajmer, 1953 S.C.R. 1049.
58 Audh Behari v. Gajadhar Lal 1955 S.C.R. 70.
59 Bhikaji Narain Dhakras v. State of Madhya Pradesh 1955 S.C.R. 589.
60 State of Bihar v. Maharajadhiraja Kameshwar Singh, 1952 S.C.R. 948.

CHAPTER VIII

FUNDAMENTAL RIGHTS

III

CRIMINAL PROCEDURE

Articles 20, 21 and 22 lay down some fundamental principles concerning arrest, detension and trial of persons accused of violating the law. Article 20 proclaims that no one can be punished for an act which was not a crime in law at the time it was committed. It further assures that a convict cannot be subjected to heavier pains and penalties for a crime than those which its commission could attract under the laws as it stood when the offence was committed. The Supreme Court has invariably reduced sentences to what was permissible at the time the offence was committed. Happily the legislature has made no attempt to create offence by ex-post facto legislation.

Article 21 assures an accused a trial according to procedure established by law. This bars the executive from tampering with the procedure as laid down by law. It was claimed that procedure established by law was equivalent to due process of law of the American Constitution.[1] But even in the United States due process of law was purely procedural in origin. Its basic ingredients are reasonable notice and fair hearing.[2] In course of time, however, 'the term came rather to mean due process of law'. Laws rather than procedure became its concern. 'Laws were upheld only if they involved the use of rationally relevant means to effect a legitimate objective of governmental power'. This expanded interpretation of due process to the provisions in the Indian Constitution the Supreme Court in India refused to apply and held that all that was required was that the procedure followed should have been laid down by a valid law.[4] This prohibition applies also to the police investigation prior to the production of an accused before the Court.[5] But 'the man who cares for due process of law must also care for due enforcement of the law and he will not suppose that a steady accumulation of small hurdles can be placed in the way of the

police officer without reducing the effectiveness of the general defence against unfairness.'[6] The Supreme Court has held that a departure from the procedure laid down by law need not always vitiate a trial. If, after taking cognisance of a case, the court discovers that the procedure for investigation had not been strictly followed, it may cure the irregularity by ordering a fresh investigation.[7] Similarly even if an accused was not specifically charged with having committed a particular offence, his conviction for the same may be upheld unless it is either found or can be presumed that he has been handicapped in his defenee thereby.[8] By its interpretation of the statutory law of procedure, the Supreme Court has tried to secure that a person accused of an offence gets a square deal both during investigation and trial. It has frowned upon all departures which in anyway seemed to undermine facilities for proper defence[9] or which took short cuts to conviction.[10]

'A person accused of the commission of an offence has no fundamental right to trial by a particular procedure except in so far as any constitutional objection by way of discrimination or by violation of any other fundamental right may be involved'.[11] But an accused can claim that he be not tried under a procedure which discriminates against him as against other accused similarly situated. If the procedure in a case is found to be less advantageous to an accused than the one under which other accused of the same offence and falling under the same validly created category are tried, the trial is bad at law, the conviction would be set aside and the accused may either be acquitted or a retrial ordered.[12]

Article 20 (1) warrants change of procedure by law. This seems to give the widest scope to the legislature. But other provisions of the Constitution curtail the exercise of the unlimited power which this seems to vest in the legislature. Article 22, for example, lays down provisions which cannot be violated with impugnity by any legislature. Similarly an accused cannot be discriminated against to his disadvantage.

Article 20 (2) protects a person against 'double jeopardy'. Its protection, however, is not as comprehensive as that in the Constitution of the United States or at common law in the United Kingdom. In 1904, in Ex Parte Lange the Supreme Court of the

United States held that protection against double jeopardy barred the government from filing an appeal after a verdict of acquittal.[13] Here, as the Supreme Court has interpreted the clause, no one can be tried again for the same offence only if he has been already tried and punished for it by a court or judicial tribunal competent to award punishment for that.[14] This makes it permissible to prosecute and punish a man for the same offence after he has been tried for it but discharged or acquitted. The Indian Constitution affords an accused no protection if his earlier trial has been held null and void[15] or if he has been subjected to pains and penalties when these have been inflicted on him as a result of a departmental inquiry[16] or of administrative action.[17] It has been held that dismissal from service following an inquiry by a commissioner is not a punishment under article 20(1). A civil servant may be prosecuted for an offence even when he may have been departmentally penalised for it. Similarly it was held that confiscation of smuggled goods by the Customs is no bar to the smugglers' being prosecuted in a court of law,[18] In re Dana and Frey, the Supreme Court however left open the question whether prosecution and punishment of an accused in cases in which he had already been tried and punished as a result of some judicial proceedings earlier did or did not offend against the guarantee given in article 20(2)[19]. Though the Supreme Court held that action taken by a jail Superintendent under the Punjab Communist Detenues Rule, 1950, against detenues did not constitute either prosecution or punishment and made their prosecution and punishment by a court possible, it was found that jail rules under which the accused had been punished barred such prosecution and punishment for the same offence once the Superintendent himself had taken action against a detenue.[20] Prosecution for a different set of acts constitution a separate offence is not barred even when the second set of facts may follow or arise out of the first for which the accused may have been already dealt with.[21] It has been claimed that prosecution under a different provision of the law for the same act or acts falling under two different categories of crimes is permissible even after the accused has been punished once under a different provision of the law. Thus an accused may be punished for conspiracy to comment a crime even after he has

been convicted for the substantive offence.[22] The Supreme Court rejected the spurious claim that an appeal against an order of acquittal is a second prosecution holding that an appeal whereso-ever taken is simply a continuation of the original case.[23]

Article 20 (3) lays down that 'no person accused of an offence shall be compelled to be a witness against himself'. But at any stage of the inquiry or trial the court may call upon the accused to explain any circumstances appearing in evidence against him putting such question to him as the court considers necessary. But 'the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner.'[24] The Indian procedure also requires that 'after the witnesses for the prosecution have been examined, the court shall question the accused generally on the case'. It was suggested that these provisions militate against the protection given under article 20 (1). But the Supreme Court repelled the suggestion. 'The whole object of the section is to afford the accused a fair and proper opportunity of explaining the circumstances which appear against him'. 'The accused must be questioned about each material circumstance which is intended to be used against him. The questions must be fair and must be couched in a form which an ignorant and illiterate person may be able to appreciate and understand.'[25] Moreover, when the court puts these questions the accused is not on oath. He is at liberty to decline to answer them. He cannot be punished either for his refusal to answer the questions or prosecuted for perjury for having given answers which are not true. His testimony cannot but put in evidence in the trial or the inquiry. The court or the jury, however, is at liberty to draw what inference it may think fit from the refusal of the accused to answer questions or from the answers he may have given. His answers, it has been claimed, may provide an alternative explanation of the circumstances of the case.[26] This is very important for the defence as the Supreme Court has held that an accused may be convicted only when the circumstances in the case can be explained by the version established in the court by the prosecution and by none other.[27]

An accused may make a voluntary confession[28]. He cannot make

any statement to the police when in its custody. He must be removed from police custody and taken before a magistrate who, before recording the confession must convince himself that the confession is being made without any inducement, threat or violence. The magistrate must explain to the accused that he is not bound to make a confession and that his confession when made will be used against him.[29] 'When the accused person is produced before a magistrate by an investigation officer for recording his confession, the effective way of securing freedom from fear to the accused person is to send him to jail custody and give him adequate time to consider whether he should make a confession at all. Speaking generally it would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession.'[30]

The protection thus guaranteed has been extended to documents or articles the production of which would incriminate a person if he were formally accused of the offence before a court or judicial tribunal. In M. P. Sharma v. Satish Chandra the Supreme Court held that this guarantee was available even to persons against whom a first information report had been lodged with the police. By analogy it is also available to a person against whom a complaint has been lodged in a court even though he may not have been formally charged with an offence.[31]

An attempt was made to extend article 20(3) to cover searches and seizures of papers and documents as well. The Supreme Court however held that 'it is not legitimate to assume that protection under article 20(3) would be defeated by statutory provision of searches'. 'When the Constitution-makers have thought fit not to subject such regulations to constitutional limitations', the Supreme Court went on to say, 'we have no justification for importing it into a totally different fundamental right.'[32] Even in the United States 'if the law requires certain data to be kept in the course of business and made available for inspection as a means of facilitating enforcement of valid regulatory provisions, there is no violation if information yielded by those sources is used as evidence.'[33] The protection does not extend to the production of documents and evidence in taxation proceedings or in suits for

rendition of accounts or similar other actions. In the United States a law 'may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors who then can use it to convict him.'[84]

An abuse of criminal procedure may arise out of the custom of laying traps for persons suspected of bribery and corruption. As pointed out below[85] the Supreme Court frowned upon attempts made by the police to secure evidence against a person by providing the wherewithals to induce him to commit it. In Shiv Bahadur Singh v. the State of Madhya Pradesh, however, it accepted the evidence so secured and upheld the conviction.[86] In Ramjanam Singh v. State of Bihar,[87] where the appellant Sub-Inspector of Police had been convicted under Prevention of Corruption Act, it rejected the evidence secured under suspicious circumstances. The accused had in fact recommended to the Magistrate that Sitaram Dusad be discharged before any bribe was said to have been paid to him. In the circumstances of the case, the Court held that it was not a case of laying a trap in the usual way for a man who was demanding a bribe but of deliberately tempting a man to his own undoing after his suggestion of breaking a law had been finally and conclusively rejected. The Court added:—

'Whatever the criminal tendencies of a man may be, he has a right to except that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and keepers of the law. However regrettable the necessity of employing agents provocatures may be (and we realise to the full that this is unfortunately often inevitable if corruption is to be detected and bribery stamped out), it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally and firmly decided shall not be done.

'The very best of men have moments of weakness and temptation, and even the worst have times when they repent of an evil thought and are given an inner strength to set Satan behind them; and if they do, whether it is because of caution, or because of their

better instincts, or because some other has shown them either the futility or the wickedness of wrong doing, it behoves society and the state to protect them and help them in their good resolve, not to place further temptation in their way and start a fresh train of criminal thought which has been finally set aside.'

Article 22(1) lays down that no person shall be detained in custody without being informed as soon as may be, of the grounds of such arrest. Indian criminal procedure allows arrests on the authority of warrants issued by competent magistrates and arrests by police officers without a warrant. A warrant is an authority for arresting a person for his having committed an offence which is named in the warrant. The Supreme Court held that Article 22(1) protects persons arrested without a warrant by an act of the executive or other non-judicial authorities.[88]

The latter part of clause 1 of article 22 gives an accused the right to consult and be defended by a legal practioner of his own choice. The right is acquired as soon as he is accused of an offence i.e. from the moment of his arrest. Whether the offence for which he is arrested is shown on the warrant authorising his arrest or is communicated to him later, he is arrested because he is accused of having committed an offence. He can claim that he be allowed to secure a lawyer. When he does so the magistrate must afford the lawyer necessary opportunities for consulting the accused without the opposition side learning anything about the nature of these consultations. Interviews, it has been held, must be arranged between an accused and his lawyer out of the hearing but within sight of the jail or police authorities.[89] The lawyer must be selected by the accused himself. When a person is accused of a serious offence, the court may engage a lawyer for the defence of an unrepresented accused if the accused himself cannot afford to do so. Of course an accused may, knowingly and wisely, waive his right to engage a lawyer.

PREVENTIVE DETENTION

The Constitution guarantees freedom of speech and expression and also assures freedom of movement and other allied rights. But as said earlier these are rights of free men only. A man may

lose his freedom either by being convicted and sentenced for committing an offence or he may lose it because there are grounds for believing that he is about to commit one of the specified offences for which he can be detained. The Constitution allows the Union Government to legislate for and deal with preventive detention for reasons connected with defence, foreign affairs, security of India, security of a State, maintenance of public order or the maintenance of supplies and services essential to the community.[40] A State Government may legislate for preventive detention for reasons connected with the security of the State, maintenance of public order and maintenance of supplies essential to the community.[41] Parliament and States have both passed Acts under this provision. A person may therefore be detained under legislation authorizing such detention for any one of those grounds in order to prevent his committing a crime. In P. N. Lakhanpal v. State of Jammu and Kashmir[42] the Supreme Court upheld the constitutionality of the Constitution (Application to Jammu and Kashmir) Order 1954. In Puranlal Lakhanpal v. Union of India[43] the Supreme Court held the Preventive Detention Act valid against the attack that it set up advisory boards for considering all cases of detention instead of cases of detention where it was to run for more than three months. The Supreme Court declared that duration could be fixed only after the advisory board had held the detention justifiable. The Constitution requires that an advisory board be set up when a law authorises detention for more than three months. The grounds for detention cast a wide net, particularly those connected with the maintenance of public order. A man may be detained for three months provided the detaining authority is personally satisfied that there are satisfactory grounds to believe that the detention is necessary for any of the specified reasons.

Under the first Preventive Detention Act grounds of detention had to be communicated to the detenue as soon as may be in order to make it possible for him to make a representation against the order. The interval between detention and the furnishing of grounds could vary in different cases. An interval of sixteen days was held justified in the peculiar circumstances of a case. Here the State Government had to deal with a large number of cases

overnight and it was felt that though the detaining authority could decide that the persons concerned be detained for grounds which existed at the time the orders were passed, some time had to be allowed to the State for furnishing the grounds to the detenues.[45]

The first Preventive Detention Act, 1950, made the grounds for detentions communicated to the detenue confidential information which the detenue could not divulge. The Supreme Court held that the grounds must be available to the Court to enable it to decide whether the grounds supplied are related to the objects of preventative detention and are such as would enable the detenue to make a proper representation against them. It held section 14 of the Preventive Detention Act 1950 void. It also held that the grounds should neither be so general nor so vague as to make it impossible for a detenue to rebut them.[46]

The Court conceded that sufficiency of reasons for detaining a person for grounds communicated to him is a matter left to the detaining authority. But whether they are specific enough to enable a detenue to make a representation is for the Court to decide. In Ram Singh v. State of Delhi it was held that if detention was grounded on speeches, it was enough so to specify the time of the speeches, the place or places where the speeches were made, their contents in general and their apprehended effect so as to make it possible for the detenue to rebut any or all of these factors.[47] The Court could also examine an order of detention with a view to decide whether the grounds furnished are relevant to detention,[48] whether they are related to the objectives the Constitution had in view in arming the executive with this wide discretionary power. In Shibban Lal Saxena v. State of U.P., it was held that the introduction of irrelevant matters would vitiate the detention order even though there may be only a few grounds that were irrelevant or illusory.[49]

In Lawrence Joachim Joseph D'souza v. State of Bombay, the Supreme Court held that the rights of the detenue under art. 22(5) to be furnished particulars is subject to limitation under art. 22(6) whereby disclosure of facts considered to be against public interest cannot be required. 'Both the obligation to furnish particulars and the duty to consider whether the disclosure of any involved

therein is against public interest, are vested in the detaining authority, not in any other. There is no obligation under article 22(5) and (6) to communicate to the detenue the decision not to disclose the grounds nor to define the ambit of the non-disclosure at the time when the grounds are furnished. The necessity for such a communication would arise only if the detenue, feeling the grounds to be vague asks for particulars. An obligation to communicate the decision not to disclose facts considered prejudicial to public interest may well be implied in such a situation. But in the absence of any such request by the detenue, the non-communication of the decision cannot be held to have hampered his constitutional right of representation and an obligation to communicate cannot be implied in these circumstances.'[50]

The period of detention can be fixed now only after the advisory committee has reported that the detention is justified. The Government cannot fix the period in the original order.[51] Under the Act as it now stands all orders of detention with relevant papers must be placed before the advisory board. The detenue can appear in person before the board. The report of the advisory board must be submitted within ten weeks of the order of detention. If no report has been made within the period, the detenue would be, as in Dharam Singh Rathi v. State of Punjab,[52] set at liberty. A detenue may challenge the order as malafide; he can rebut the assertion that all or any of the grounds do not exist in his case. The Supreme Court struck down orders for detention when it considered they were not bona-fide.[53] It ordered the release of detenue when the advisory board held any one of the grounds absent in the case. It argued that the order could be assumed to have been passed because the detaining authority was satisfied that all the grounds taken together necessitated making it. If any one of them could be proved to have not existed at all at the time when the order was made, it could not be presumed that the detaining authority would have made the order.[54]

The advisory board may fix the period for which a detenue is to be kept in detention. The first preventive Detention Act passed in 1950 was to expire in 1952. The duration of the sccond was two years. The present Act will expire in 1960. It was argued

that a detention order made under a temporary Act could not survive the expiry of the Act, even though an amending measure was passed to extend its life or a new Act passed before the expiry of the one under which the detention order had been passed. Following the principles of interpretation used in interpreting other statutes, the Supreme Court did not uphold this argument. The question really arose in cases where either the advisory board or the detaining authority had not specified the period of detention. It was claimed that, as suggested in Dr. N. B. Khare v. State of Delhi,[55] it could be assumed that such orders were intended to expire when the Act expired. In Venkateshwarloo v. Superintendent, Central Jail, Madras the appellant's detention was confirmed by the Government of Hyderabad State on January 21, 1952 and the detention was to continue till March 31. On 29 March his detention was extended till September 30. On 29 September, an order was passed extending the detention till December 31. It was held that an order under the Preventive Detention Act 1950 as amended in 1951 and 1952 could not validly detain a detenue beyond the date on which the Act was to expire. He could not be detained beyond the date of expiry of the Act under which his detention was last extended merely because a new Act was to come into force as soon as the old Act expired.[56] But relief must be due when it is claimed. The Supreme Court held that the detention would be judged by the terms of the Act in force at the time the detention was challenged. In some cases it was argued that there may occur an interval of illegal detention between one valid detention and another. But the Court held that it could grant relief only if it was due at the time it was claimed.[57]

It is open to the detaining authority to issue a new order of detention when an order has been held bad or has expired. The new order would be examined as if it had nothing to do with the earlier action. Thus a detenue released on account of a bad order can be immediately arrested and detained by a new order. A detenue was actually arrested and so detained.

As the law stands at present, the executive may bank on its escaping submitting its orders for detention to an advisory board if it hopes to terminate the detention before the end of three months.

But it has to supply grounds for detention to the detenue forthwith. Where the grounds thus supplied were discovered to be unrelated to the purpose of preventive detention, the detenue may secure freedom through a writ of Habeas Corpus. In other such cases the detenues were set at liberty when it was discovered that the grounds would not be maintainable before the advisory board.

In Shamrao Vishnu Parulekar and others v. the District Magistrate, Thana,[58] the Supreme Court held that the failure of the District Magistrate to send to the government the grounds which were subsequently communicated to the detenue was not a breach of the requirement of sub section 3 (3) of the Preventive Detention Act. When he reported the material on which he made the order there was sufficient compliance with the requirement of the sub-section.

In Keshar Nilkanth Joglekar and others v. the Commissioner of Police, Greater Bombay,[59] it was held that the interval of eight days between the passing of the order of detention and making of the report to the Government was unavoidable and therefore the report was presumed to have been sent forthwith within the meaning of section 3 (3) of the Preventive Detention Act.

(3)

It is best to remember that fundamental rights in India, as civil liberties in the United State, 'draw, at best, only limited strength from legal guarantees. Much that should be rejected as illiberal, because repressive and unjust may well not be unconstitutional'. 'What matters most is whether standards of reason and fair dealings are bred in the bones of the people'. 'A persistent, positive translation of liberating force into feelings and thoughts of men and women is the real protection against attempts to straight-jacket the human minds.'[60] It has been suggested that 'Hyde Park represents a devotion to free speech more effective than constitutional guarantees'. But as Justice Frankfurther assures us[61] 'the standard of what is fair and just set by courts are perhaps the single most powerful influence in promoting the spirit of law throughout government. These standards also help to shape the dominant civic habits and attitudes which ultimately determine

the ethics of society'. 'But Court cannot give help until it is sought by a courageous and energetic member of the affected minority. Its help may be so slow in coming as to be virtually useless. And when it comes it helps the petitioner and most others indistinguishably situated.[62] But, 'efficient or not, the intervention of the courts inevitably encourages the impression that they constitute the first line of defence where civil liberties are concerned.'[63] It is hoped that the story of the work of the Supreme Court unfolded in these pages lends colour to Professor Richardson's beliefs as will as supports Justice Frankfurther's analysis of the function of the court in promoting the pervasion of government by law and engendering civic habits favourable to the maintenance of the rule of law in India.

NOTES

1 A. K. Gopalan v. State of Madras, 1950 S.C.R. 97
2 Cf. *Nine Mem* by Fred Roddel Morgon v. U.S., 304, U.S. 118, 19 (1938), Vong Yong Sung v. McGrath, 339, U.S. 33, 80 (1950)
3 Dumbold 90, 91.
4 Mukherjea J. in A. K. Gopalan v. State of Madras, 1950 S.C.R. 97, 101, 102.
5 Ibid.
6 Dean Bundy in *Government Under Law* 374.
7 Umraomal v. State of Rajasthan, A.I.R. 1955. Raj. 6.
8 See below; 'The Supreme Court Resolves a Clash, Chapter XI.
9 State of Bombay v. Atmaram Shridhar Vaidya, 1951 S.C.R. 167.
10 See below, Chapter XII.
11 Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, 1953 S.C.R. 1188.
12 Cf. below, Chapter XII.
13 Ex Parte Lange, 18 Wall 168, 169.
14 Maqbool Hussain v. State of Bombay, 1953 S.C.R. 730.
15 A.I.R. 1957 S.C. 494.
16 Venkataram v. Union of India, 1954 S.C.R. 1150.
17 Ibid.
18 Maqbool Hussain v. State of Bombay, 1953 S.C.R. 730.
19 Thomas Dana v. Superintendent, Amritsar Jail, A.I.R. 1958 S.C. 119.
20 1953 S.C.R. 751.
21 Bashir—Ul—Haq and others v. State of West Bengal, 1953 S.C.R. 836.
22 Cf. Thomas Dana cited above.
23 Kalavati and Others v. Himachal Pradesh, 1953 S.C.R. 546.
24 Bhagwan Singh v. State of Punjab, A.I.R. 1952 S.C. 214.
25 Ajmer Singh v. State of Punjab, 1953 S.C.R. 418.
26 Hate Singh Bhagat Singh v. State of Madhya Bharat, A.I.R. 1953 S.C. 468.

27 Ibid.
28 Kalawati v. State of Himachal Pradesh, 1953 S.C.R. 546.
29 Aher Raja Khema v. State of Saurshtra, A.I.R. 1956, S.C. 217.
30 Sarwan Singh v. State of Punjab, A.I.R. 1957, S.C. 637.
31 M. P. Sharma v. Satish Chandra.
32 Ibid.
33 Dumbold, 83.
34 Shapiro v. U.S. 335. U.S., 70 (1948).
35 See below Chapter XII.
36 Shiv Bahadur Singh v. The State of M.P. A.I.R. 1958, S.C. 163.
37 Ramjanam Singh v. State of Bihar, A.I.R. 1956 S.C. 643.
38 Ajaib Singh v. State of Punjab, 1953, S.C.R. 254.
39 A. K. Gopalan v. State of Madras, 1950 S.C.R. 88.
40 Schedule VII, union list.
41 3rd Item in the concurrent list, Schedule VII.
42 P. N. Lakhanpal v. State of Jammu and Kashmir, A.I.R. 1956, S.C. 197.
43 Puranlal Lakhanpal v. Union of India, A.I.R. 1958, S.C. 163.
44 State of Bombay v. Atmaram Shridhar, 1951; S.C.R. 167; Ashutosh v. State of Delhi, A.I.R. 1953 S.C. 453.
45 Tarapada De and Others v. State of West Bengal, 1951, S.C.R. 212.
46 A. K. Gopalan v. State of Madras.
47 Ram Singh v. State of Delhi, 1951 S.C.R. 451.
48 Tarapada De v. State of West Bengal, 1951 S.C.R. 212.
49 Shibbanlal Saxena v. State of U.P., 1954 S.C.R. 418.
50 Lawrence Joachim Joseph D'souza v. State of Bombay, A.I.R. 1956 S.C. 531.
51 Puranlal Lakhanpal v. Union of India, A.I.R. 1958, S.C. 163.
52 Dharam Singh Rathi v. State of Punjab, A.I.R. 1958, S.C. 152.
53 Dr. Ram Krishan Bhardwaj v. State of Delhi, 1953 S.C.R. 708.
54 See above, note 79.
55 Dr. N. B. Khare v. State of Delhi, 1950, S.C.R. 519.
56 Venkateshwarloo v. Superintendent Central Jail, Madras, A.I.R. 1953, S.C. 49.
57 Naranjan Singh Nathawan and Others v. The State of Punjab, 1952, S.C.R. 395.
58 Shamrao Vishnu Parulekar v. The District Magistrate Thana, A.I.R. 1957 S.C. 23.
59 Keshav Nilkanth Joglekar v. The Commissioner of Police, Greater Bombay. A.I.R. 1957, S.C. 28.
60 Justice Frankfurter in Dennis v. U.S.A. 1951, 341 U.S. 494.
61 Frankfurter J. in *Government Under Law*, page 31.
62 Richardson, *Harvard Law Review* page 51. (*Essay on Freedom of Expression and the Functions of the Constitution*).
63 Richardson, *Harvard Law Review*, Page 52.

CHAPTER IX

THE SUPREME COURT AND PUBLIC SERVICES

Following the Government of India Act, 1953, the Constitution of India guaranteed certain rights and interests of public servants. The Supreme Court was several times called upon to interpret the relevant provisions of the Constitution as well as act as a protector of the interests of public servants approaching the Supreme Court either as Indian citizens or persons whose interests were otherwise guaranteed in the Constitutions. In doing so it partly upheld the prevalent interpretation of the law and partly blazed a new trail.

The political activities of the civil servants were called in question with regard to elections. Reversing the decisions of the Elections Tribunals, the Supreme Court held that a civil servant could nominate a candidate for election to the State legislature or Parliament. It also held that if a government servant acted as a polling agent of a candidate, he did not offend against any election provisions merely by acting in that capacity.[1]

The Supreme Court was called upon to consider the nature of the office a civil servant holds in India. Following the English practice all civil servants in India were held to hold their office 'during the pleasure' of the Crown. But the Indian Civil Servants entered into 'a covenant' with the Secretary of State for India on appointment. As the successor of the East India Company the Secretary of State for India in Council could sue and be sued as well. The aggrieved civil servants could thus sue the Secretary of State. The Federal Court had held that under the provisions of the Government of India Act, 1935 it could, in appropriate cases, pass an order that a member of the Indian Civil Service, though removed from office by the Secretary of State or any other authority, was still a member of the Indian Civil Service. The Privy Council had however ruled that such a civil servant could neither secure an order for reinstatement nor claim the arrears of a salary as the office was held 'during pleasure'.[2] The Supreme Court refused

to accept the English interpretation of 'during pleasure' in the context of the place of civil servants in the constitution. 'The rule of English law has not been fully adopted in S. 240 (of the Government of India Act 1935). Section 240 itself places restrictions and limitations on the exercise of that pleasure and those restrictions must be given effect to.' In the State of Bihar v. Abdul Majid[3] it declared; 'it was not implicit in it (the concept of office during royal pleasure) that a civil servant serves the Crown *ex gratia* or that his salary is in the nature of a bounty. It has again no relation or connection with the question whether an action can be filed to recover arrears of salary against the Crown'. 'The salary of its civil servants in the hands of the Crown can be seized in execution of a decree and attached. It is thus difficult to see on what grounds the claim that Crown cannot be sued for arrears of salary directly by the civil servant, though his creditor can take it, can be based or sustained.' As the Crown could be sued in India, 'what can be claimed in England by a petition of right (or its equivalent action today), can be claimed in this country by ordinary process'. As a result of its interpretation of the Government of India Act, 1935 and the Constitution of India, when civil servants were held to have been wrongfully dismissed or removed from office they were paid arrears of their salary and reinstated in service.

But the Supreme Court held that though removal or dismissal from service as well as punitive action against a civil servant could take place only under conditions laid down by or under the Constitution, premature compulsory retirement was not so protected.[4] 'The requirements for compulsory retirement are that the officer has completed 25 years' service and that it is in public interest to dispense with his service. Compulsory retirement, as such has no stigma or implication of misbehaviour or incapacity against the public servant. The officer does not lose any benefit as he does by dismissal or removal.' 'The order of the President' compulsorily retiring a public servant, it was held, 'cannot be challenged on the ground that the appellant has not *been* afforded full opportunity of showing cause against the action sought to be taken against him'. Similarly the Supreme Court held in Hortwell

Prescott Singh v. the Uttar Pradesh Government and others[5] that reversion from a temporary post held by a person does not per se amount to reduction in rank because the temporary post held by him is not his substantive rank.

One of the rights enjoyed by a civil servant in India is that under Article 311 of the Constitution he cannot be removed 'by an authority subordinate to that by which he was appointed'. It was contended in Mahesh Prashad v. State of Uttar Pradesh[6] that the authority competent to remove must be either the very authority which appointed the civil servant or any other authority directly superior to the appointing authority in the same department. Such an interpretation would have demanded perpetuation of the existing structure of administrative organization or entrusting the power to remove civil servants to the higher authority every time there was any substantial change in the administrative structure. The Supreme Court held that the Constitution only demands that a civil servant cannot be lawfully removed by an authority subordinate to the one by which he was appointed. It is not necessary that the removal must be by the same authority or by his direct superior. 'It is enough if the removing authority is of the same rank.'

In P. Joseph John v. State of Travancore-Cochin[7] the appellant asked for the quashing of the order of the government removing him from service and permanently debarring him from reappointment. The appellant had been served with a notice by the Chief Secretary to the Government of Travancore-Cochin holding, under the rules of business framed by the Rajpramukh, the charge of the portfolio of 'service and appointments'. The notice called upon him to show cause, within a specified period, why he should not be removed from office in view of the adverse report of the Inquiry Commissioner appointed to inquire into the charges framed against him. The Report of the Commissioner included all the material on which he had reported against the appellant. The Supreme Court found that the appellant had been supplied all the material on the strength of which the government proposed to remove him from service and that he had been given ample time to enter on his defence. Under the circumstances, it declared that 'he cannot

now be heard to say that he was not given reasonable opportunity of showing cause against the action proposed to be taken against him.'

The appellant had questioned the validity of the notice issued to him over the signature of the Chief Secretary and claimed that the inquiry could have been ordered only by the Rajpramukh. The Supreme Court found that the notice had been issued after the Council of Ministers had passed a resolution to that effect. 'It must be presumed that in the normal course of business that resolution was communicated to the Rajpramukh. The order thus substantially complies with the requirements of law.'[8] 'Clause 1 and 2 of Article 116—laying down the procedure for enquiry—'are directory only. Non-compliance with them does not result in the order being invalid. In order to determine whether there is compliance with these provisions all that is necessary to be seen is whether there has been any substantial compliance with them'. 'In any case the fact of its (notice's) not being expressed as directed by Article 166 does not vitiate the notification'. 'It is an elementary principle of democratic government prevailing in England and adopted in our Constitution that the Rajpramukh or the Governor is the head and he is bound to accept the advice of his ministers. In this situation it cannot be held that the order of the government appointing the Inquiry Commissioner was ultra vires or without jurisdiction.' [9]

It was further contended that the Government should have again consulted the Public Service Commission after he was asked to show cause why he should not be removed from office. The Supreme Court found that 'in this case the government had consulted the Public Service Commission in the matter of the action proposed to be taken against the petitioner. The Public Service Commission had agreed to the proposed action. The Supreme Court held that as the appellant did not enter upon any defence and 'did not show cause, no question arose of consulting the Public Service Commission again.' [10]

The appellant had further contended that when he presented a review petition against the order of removal the Public Service Commission should have been consulted again. The Supreme

Court held that 'the consultation envisaged by article 320 does not extend so far'.

In Om Prakash Gupta v. The State of Uttar Pradesh[11] the appellant claimed the arrears of pay. He was first suspended and then dismissed. On appeal it had been held that he had been wrongfully dismissed. In the present case he came in appeal to the Supreme Court demanding arrears of salary for the period when he was not paid his salary. The Government of Uttar Pradesh contended that when the order of his dismissal was held illegal, the order of his suspension continued and therefore no salary was due to him as he was still under suspension. The Supreme Court decided that an order of suspension was an interim order. It was made pending an enquiry and came to an end as soon as an order for dismissal was passed. 'The order of dismissal replaced the order of suspension which then ceased to exist'. When the order for dismissal was held void, the order for suspension could not be revived as it did not exist. He was held entitled to his salary for the period during which he stood dismissed. He could claim full salary for the period of suspension if it could be held that he had been wrongfully suspended. There was a right of appeal against an order imposing a penalty of suspension. *But* the provisions of Rule 5th of Fundamental Rules did not necessarily lead to the conclusion that penalty of suspension could be imposed only after an inquiry. 'A public servant can be suspended for good and sufficient reasons based on materials existing when the order is made.' The claim for arrears of salary for the suspension period would, however, have necessitated a re-examination of the question in the courts below. The appellant opposed a remanding of the case to courts below on account of the heavy cost he would have to incur and agreed to forego any claim for the salary for the period of suspension. The Court, therefore, awarded him a decree for the period for which he stood dismissed.

In Satish Chandra Anand v. the Union of India,[12] the Supreme Court held that the State could enter into a contract for temporary employment and impose special terms in each case provided they were not inconsistent with the Constitution. 'Those who

accept these terms and enter into contracts with the State are bound by them even as the State is bound by them.'

A very interesting issue arose in the State of Madhya Pradesh v. G. C. Mandawar.[13] The respondent claimed that he—and other public servants in the Madhya Pradesh—had been discriminated against by the Madhya Pradesh Government's giving them dearness allowances on a scale lower than the one which the Union Government was allowing. The Supreme Court held that under their terms of service the public servants were not entitled to any dearness allowance. 'Whether the State will grant dearness allowance and if so, how much, is a matter *ex gratia* and not justiciable. Prayer for mandamus could be granted only when there is in the applicant a right to compel the performance of some duty cast on the opponent.' The Supreme Court held that a scale of allowance differing from the one granted by the Union Government was not repugnant to article 14 as the two different scales applied to two different classes of public servants serving two different governments.

Just before the emergence of the Dominion of India, Indian Civil Servants serving under a contract with the Secretary of State for India were asked if they would like to serve the new government which would emerge after partition. They were offered some compensation if they chose not to continue in service under the new government. On receiving their replies the Government of India notified to some of them that it did not wish to continue them in service. Mr. K. M. Rajagopalan had been told his services would not be continued. He accepted the compensation that he was offered. Later on, however, he complained that his services had been wrongfully dispensed with. In the State of Madras and another v. K. M. Rajagopalan,[14] the Supreme Court held that the respondent was holding office only during His Majesty's pleasure. 'When His Majesty's Government decided to transfer its power to the Dominion of India on and from August 15, 1947, the career of the respondent under covenant with the Secretary of State came to a legal termination on and from August 15, 1947. The services of the respondent came to an automatic end on the emergence of the Dominion of India. The respondent is not entitled to the

declaration that he is still a member of the Secretary of State's services.'

The Supreme Court struck an effective blow to communalism which had under the British regime kept into appointments to public services as well. The Madras Government had issued a general resolution whereby all vacancies in the civil services had been distributed community-wise. In Venkataraman v. State of Madras,[15] it held the allotment of vacancies community-wise unconstitutional and void, as offending against articles 14 and 15 of the Indian Constitution. This made it possible that civil servants would be appointed on merits rather than on having been born into favoured communities.

In another inconclusive case, the Supreme Court served the cause of justice and merit against official vagaries. A civil servant was employed temporarily by the Ministry of Information and Broadcasting. When the permanent appointment came to be made the Public Service Commission had to be consulted. It was decided to call for applications from qualified candidates and also to consider such temporary employees as were already working in the ministry. The Ministry claimed to exercise its discretion and refused to include in its recommendation of temporary servants to be considered for the post one of its temporary employees whereas names of some employees junior to the excluded civil servant were sent up for consideration by the Union Public Service Commission. He approached the Supreme Court for a writ of mandamus directing the Ministry to include his name. After the case had been going on for some time, the Ministry included his name in the list and the case was withdrawn.

A matter concerning public servants came up before the Supreme Court for decision in special appeal against the orders of the High Court of Allahabad. Phundi Singh had filed a complaint against Kedarnath and Matadin alleging that they were about to cut down his standing crop and promote breach of peace thereby. The Sub-Divisional Magistrate attached the standing crop till the final disposal of the case. Meanwhile the defendants went to the District Magistrate and filed an application saying that the case started against them was *mala fide*. They made allegations

against the trying Magistrate. This application was accompanied by a recommendatory letter from the secretary, District Congress Committee. Unfortunately the permanent incumbent of the post was absent on leave. The officiating District Magistrate, rather unwisely, sent this application to Sub-Divisional Officer, Jalaun, for report. This was most extraordinary as it involved calling for a report from a Magistrate in a case which was still *sub judice*. The Sub-Divisional officer refused to make a report in answer to the District Magistrate's order on the application and suggested that if the applicants had any complaint to make they should file a regular suit for transfer of the case. The District Magistrate advised them to file a formal and regular complaint in the Court of the Sub-Divisional Magistrate.

Apparently no harm had been done to anyone. The straightforward course which the Sub-Divisional Magistrate adopted and the realisation by the District Magistrate of his mistake left the things as they were. Of course the Sub-Divisional Magistrate had been intimated that according to the secretary, District Congress Committee, the case he was trying was a false one. He had, however, refused to be intimidated.

Phundi Singh, however, filed an application before the High Court of Allahabad requesting that contempt of court proceedings be started against Mohammad Munawar, the officiating District Magistrate who had received the application of Kedaranath and Matadin and asked for a report from the Sub-Divisional Officer in a case which that officer was still trying. Phundi Singh also requested that similar proceeding be started against Rizwan-ul-Hasan who had received by post on 22 March an application from Sri Ram, brother of Kedarnath, the defendant in the case, and transmitted it to the Sub-Divisional Magistrate for report. The application of Sri Ram had made allegations against the trying magistrate. On the Sub-Divisional Magistrate's naturally denying the allegations made against him, the District Magistrate refused to withdraw the case from his court. Phundi Singh now requested that Rizwan-ul-Hasan had committed contempt of the court of the Sub-Divisional Magistrate by sending to him the application of Sri Ram containing allegations against the trying magistrate.

The High Court of Allahabad held both Mohammad Munawar and Rizwan-ul-Hasan guilty of contempt. The Supreme Court in appeal reversed the decision of the High Court and quashed the sentences passed on Mohammad Munawar and Rizwan-ul-Hasan. The really guilty party was the secretary of the District Congress Committee. The officiating District Magistrate may have been unwise in sending the application to the Sub-Divisional-Officer. The District Magistrate may also have been influenced by the pressure of the party in power in sending Sri Ram's application to the Sub-Divisional-Officer for report. The Supreme Court refused to penalise the magistrates for not showing enough stamina in opposing the pressure put upon them.[16]

It may, however, be questioned whether the Supreme Court's description of what the two civil servants did as a normal procedure is correct. The High Court of Allahabad may ordinarily be presumed to know the normal procedure prevailing in its courts. The very fact that the first application proved infructuous proved that the District Magistrate should have advised the complainant to do what he ultimately advised them to do, make a proper and formal application in the court of the trying magistrate. In the second case again it is doubtful whether the District Magistrate was obliged to start proceedings for the transfer of the case on an application by one who was not a party to the case. Sri Ram had certainly tried to influence the decision in a case which the court was trying.

In dealing with cases of corruption against the public servants the Court broke new grounds in Shreekantiah Ramayya Munipalli v. State of Bombay.[17] It warned the courts against construing section 197 of the Code of Criminal Procedure too narrowly, declaring that 'it is no part of an official's duty to commit an offence and never can be.' It held however, that the section holding officials guilty of misconduct for things done in the course of their official duties was effective as an act may be done in the performance of 'an official duty as well as in dereliction of it.' But it added that 'it would ordinarily be unsafe to convict (a public servant) in a case like the present (for corruption) in the absence of proof indicating an adequate reason for criminal behaviour on

the part of the accused'. It argued that 'officers in the position of the accused do not commit illegal acts like this and expose themselves to a prosecution and possible disgrace unless they are prompted by some strong motives, usually of self interest.' [18]

In Mahesh Prashad v. State of Uttar Pradesh[19] it upheld the conviction of a public servant for illegal gratification. 'For conviction', it declared, 'it was enough if the public servant who received the money takes it by holding out that he will render assistance to the giver with any other public servant and the giver gives the money under that belief'. It defined the offence as 'the receipt by a public servant of illegal gratification as a motive or reward for the abuse of official position or function, by the receiver himself or by some other public servant at his instance.'

In D. N. Bannerji v. P. R. Mukherji and others[20] the Supreme Court held that a municipality was an undertaking for a public utility service under the Industrial Disputes Act. This gave its employees serving in such capacity (e.g. in the public conservancy and sanitation sections) to have their disputes settled under the Industrial Disputes Acts. The Supreme Court further held in this case that both the sanitary inspector and the head clerk were workmen under the Industrial Disputes Act and not officers.

Another question concerning the public servants arose in a very interesting manner. The Indian law requires that before a public servant can be prosecuted for any offence alleged to be committed by him in the performance of his duties, government sanction be obtained. The Income-Tax Investigation Commission issued a warrant for the search of two premises in Calcutta to inspect, take copies and secure possession of certain books, papers and documents believed to be there. The authorised officials went to what they believed to be one of these premises on the morning of December 23, 1950. The darwan of the premises resisted their attempt but they paid no heed to him. He filed a complaint on 27 December alleging that they had tied him with a rope and assaulted him causing injuries. The same officials, this time accompanied by some policemen, arrived at the second premises on the evening of December 26. Here Nand Ram Aggarwal seemed to have resisted their attempt at carrying out the search and take

possession of the necessary documents. He lodged a complaint against the four officials, some subordinates and police officials. After a judicial enquiry, summons were directed to be issued against all the accused. The first hearing of the case took place on 1 May when it was adjourned to May 22. When the cause came up again before the magistrate, the first accused filed a petition objecting that the case could not proceed on as there was no sanction for his prosecution under s. 197 C.P.C. As a result, all the accused were discharged.

Arising out of the first search, process was issued against Bhari, one of the agents of the Commission. On February 26, he filed a petition objecting to the proceeding for want of necessary sanction. The trial court overruled the objection. On revision Bhari succeeded in the High Court. In an appeal by special leave in the Supreme Court the main question was whether or not sanction was necessary under the circumstances of the two cases. It was even alleged that section 197 C.P.C. was ultra-vires, as it was discriminatory in its nature and offended article 14 of the Constitution.

The Supreme Court held that article 14 does not render section 197 C.P.C. ultra vires as the discrimination is based upon a rational classification. Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens, not so engaged, do not require this safeguard.

'To decide whether sanction was necessary or not, it was necessary for the court to ascertain the true nature of the act. For this purpose, the court must find whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of official duties, though possibly in excess of the needs and requirements of the situation.' The Supreme Court held that for an act 'to constitute an act done while in the discharge of official duties, there must be a reasonable connection between the act and the discharge of official duties; the act must bear such a relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of performance of his duties'. It held that in the instant case 'if in the exercise of the power or the performance of

the official duty improper or unlawful obstruction or resistance was encountered, there must be the right to use reasonable means to remove the obstruction or overcome the resistance'. But even if that were not conceded, 'the accused could claim that what they did was in the discharge of their official duty, whether the claim is found ultimately to be well-founded or not'. In the result the Supreme Court dismissed the two appeals and upheld the order of the High Court holding that sanction of Government was necessary before proceeding with the case[22]. In Om Prakash Gupta v. State of U.P.[22] it was held that as a public servant committing criminal breach of trust does not normally act in his capacity as a public servant, sanction to prosecute him is not necessary.

Brij Nandan Sinha v. Jyoti Narain[23] raised a delicate point of official conduct. The State Government of Bihar received reports that Jyoti Narain, a member of Bihar Civil Service, had been guilty of serious misconduct and corrupt practices in the discharge of his official duties. It decided to make an enquiry into the truth of the various charges against him and appointed a commissioner for the purpose. Jyoti Narain, however, adopted dilatory tactics. He tried to evade the enquiry and neglected to reply to the queries made from him by the commissioner. The commissioner fixed 8 December 1952 as the date for the next hearing. Jyoti Narain was again absent. The commissioner recorded that he was feeling great difficulty in contacting Jyoti Narain. He sent a copy of his order to Mr. B. N. Sinha, Deputy Secretary, with a letter requesting that the needful be done in order to establish contact between the commissioner and Jyoti Narain. The Deputy Secretary in a D.O. reply requested the commissioner to be vigilant against the dilatory tactics of Jyoti Narain. On 2 February 1953 Jyoti Narain filed an application asking that contempt of court proceedings be started against the Deputy Secretary. The commissioner rejected the application holding that the D.O. of the Deputy Secretary did not constitute contempt. Jyoti Narain started proceedings in contempt against the appellant in the High Court at Patna. On 12 June 1954 the High Court held Mr. B. N. Sinha guilty of such contempt. He appealed to the Supreme Court. Following its earlier judgment in S. A. Venkatraman v. The Union of India, the

Supreme Court held that the commissioner holding an enquiry into the conduct of a public servant does not constitute a court within the meaning of the term as used in the Contempt of Courts Act. Though the Court did not think it necessary to express any opinion as to whether the letter complained against constituted contempt of court, it noted in passing that the circumstances of the case lent support to the argument that the letter complained against did not constitute contempt of court.

In Pradyat Kumar Bose v. The Hon'ble the Chief Justice of the Calcutta High Court, the Supreme Court had to consider certain questions concerning the officers and servants of the High Courts. The appellant contended that the Governor and not the Chief Justice of the High Court could dismiss an officer of the Court and even if it be conceded that the Chief Justice could dismiss an officer of the Court, he could do so only after consulting the Public Service Commission.

The first contention arose mainly because the Chief Justice of the High Court of Calcutta had not exercised power of making rules 'relating to conditions of service of the staff of the High Court', vested in him by the Government of India Act, 1935 and article 229(2) of the Constitution. In the absence of such rules, it was contended, 'the Civil Service Rules continued to apply to the appellant'. The Supreme Court held that the Civil Service Rules did so apply but only 'so far as consistent with the Government of India Act, 1935. Under Section 242(4) of the Act this requires the substitution of the Chief Justice of the High Court for the Governor in the Civil Service Rules. The Chief Justice thus had the power of dismissing a member of the staff of the High Court even under the Rules apart from the fact that the power of the appointment vested in him under article 229(1) carries with it the power of the dismissal.'

Article 320(3)(c) of the Constitution requires that before a Civil Servant is dismissed, the Public Service Commission be consulted. Article 320(3) of the Constitution covers 'persons serving in civil capacity *under* the Government of India or the Government of a State'. The Supreme Court conceded that officers and members of the staff attached to a High Court were persons 'appointed

to public services and posts in connections with the affairs of the State' under article 310 which made them hold office 'during the pleasure of the Governor'. It also conceded that they held posts in connection with the affairs of the State and were members of the civil service of the State. But it baulked at the idea of admitting that they were persons serving *under* the Government of a State in civil capacity. The phrase 'persons serving under the Government of a State seems to have reference to such persons in respect of whom the administrative control is vested in the Government functioning in the name of the Governor or a Rajapramukh'. It held therefore that the safeguard provided in article 320(3)(c) is not applicable to the High Court staff and the Chief Justice need not have consulted the Public Service Commission before dismissing an officer of the High Court.

It is difficult to follow the argument of the Supreme Court however, when, following the Calcutta High Court and without discussing the point itself, it holds that 'article 320(3)(c) would be contrary to article 229'. Under proviso to article 229(1) the Governor can, by rules, require that all future appointments to the High Court staff be made after consultation with the State Public Service Commission. So far as appointments of the staff after the coming of the Constitution into effect is concerned, the Constitution did not place the High Court staff on any footing different from that of other civil servants. Article 320(3)(a) and (b) require that, in connection with civil services and civil posts, the Public Service Commission be consulted on all matters relating to methods of recruitment and on principles to be followed in making appointments, promotions and transfers in civil service posts and on the suitability of candidates for such appointment, promotions and transfers'. Civil services and posts include, as the Supreme Court has held, the officers and staff of the High Court. It is difficult to hold any contrariness existing between articles 229 and 320(1)(c) while conceding that article 320(1)(a) and (b) are applicable to the High Court staff.

Even the nice distinction between civil servants *of* a State and civil servants *under* a State seems to have been misconcieved. That the Constitution intended no such distinction is proved by the

provision of article 229(2) which subjects the power of the High Courts prescribing conditions of service of their staff 'to the provisions of law made by the State legislature'. All that the present judgment of the Supreme Court requires is the framing of rules by the State legislatures reproducing article 320(3)(c) when, on the Supreme Court's own showing, the provision of article 320(3)(c) would become effective. It is wrong to infer intentions of the Constitution so light-heartedly.

The High Court of Patna issued an order on July 30, 1948 that the appellant, a detenue, be released forthwith. A copy of the order of the High Court was sent to the District Magistrate, Bhagalpur the very same day. It reached his office on July 31. The District Magistrate was away from Bhagalpur on tour when the order reached his office. The detenue was not released till 8 August 1948. The High Court of Patna cited the District Magistrate for contempt of the High Court. When the case came up for hearing before the Court, the Advocate General of Bihar offered an unqualified apology on behalf of the District Magistrate. It was conceded that the District Magistrate was on tour and was not aware of the order. It was also conceded that there was no intention to flout or disobey the order of the High Court. The High Court accepted the apology tendered and discharged the rule against the accused presumably implying that he had purged himself of the contempt. The District Magistrate however appealed against what amounted to a conviction. The Supreme Court in appeal held that it was difficult to hold upon the findings of the High Court that the District Magistrate was personally guilty of contempt. The apology that he had tendered was held by the Supreme Court to have been made 'in connection with the delay which had occurred in his office'. The Supreme Court held that that apology must not be taken to be a confession of guilt and declared the magistrate free of the taint of contempt of court.

In Shambu Nath Mehra v. The State of Ajmer,[26] the Supreme Court dealt with the delicate problem of the travelling allowance paid to government servants. Shambu Nath Mehra obtained Rs. 23 as. 12 as his travelling allowance for two second class railway journeys—one from Ajmer to Abu Road and another from Abu Road

to Reengus. The Government proved that no such tickets were issued at Ajmer or Abu Road on the relevant dates. In view of the illustration (b) to section 106 of the Evidence Act the prosecution claimed that the burden of proving that the accused did pay the second-class fare was on him. The illustration declares that if 'A is charged with travelling on a Railway without a ticket, the burden of proving that he had a ticket is on him.' The Supreme Court held that the illustration has obvious reference to the offences of travelling or attempting to travel without a ticket on the railways. 'In the present case the prosecution has proved that no second class tickets from Ajmer to Abu Road or Abu Road to Reengus were issued on the relevant dates. But it was on record that tickets are not always issued and passengers can pay the fair on the train. Passengers sometimes buy a third class or inter-class ticket and pay the difference to the conductor or the guard of the train if they are able to find second class accommodation when the train arrives. There is no proof that one or other of these courses was not followed by the accused'. The Supreme Court held that the State was in a position to show that no vouchers or receipts were issued for a second class journey by the guard or the conductor of the train on those days. As they had not done so, the Supreme Court set aside the order of the Judicial Commissioner convicting the accused and restored the order of acquittal passed by the Session Judge.

Query—if the prosecution had proved that no such vouchers or receipts were issued for the relevant journeys could the conviction of the accused have been in order? Could not he claim that he travelled otherwise and claimed T. A. as permitted by the rules?

In Banarasi Das and others v. The State of Uttar Pradesh and others,[27] the Supreme Court held that like other employers, the Government is entitled to pick and choose from amongst a large number of candidates offering themselves for employment. It is entitled to exclude those who had betrayed a lack of proper sense of discipline. It almost reechoed the American conclusion that nobody has a fundamental right to be a *lekhpal*.

In the State of Punjab v. Kharaitilal[98] the counsel for the respondent raised a preliminary objection to the maintainability of the suit in the Supreme Court which had not been raised in the

courts below. The Court agreed to entertain the objection. The counsel for the appellant was, however, granted time for satisfying the Court that under the Essential Services Maintenance Act, 1947, the prosecution of Kharaitilal, a foot constable and the respondent in the case, for his absence from police lines had been properly authorized. A notification published in the Government Gazette was then produced in the Court whereby the Governor had authorised all heads of government departments and police officers above the rank of Deputy Superintendents of Police to institute cases under the Act. It was contended on behalf of the respondent that when section 7(3) of the Act, spoke of prosecution 'only upon complaint in writing of a person authorized in this behalf by the State', it implied that every complaint should be individually and separately authorized by the State Government. The Supreme Court, however, refused to accept this narrow construction and held that the section 7(3) only required that the complaint should be made by a person authorized by the State Government to do so. The High Court had acquitted the respondent as it had held that the Act was not applicable to him. The Supreme Court declared this view of the Act to be entirely wrong as it omitted to take notice of section 3 of the Act which made the Act applicable to every government employee. On the facts of the case, however, the Supreme Court held that 'the respondent had been rightly acquitted by the High Court though for wholly wrong reasons'. 'On account of his physical infirmity, the respondent had been excused the routine duty of a foot constable and had not been assigned any work. His absence from police line during the relevant time was neither absence from work nor was it an abandonment of employment'. In S. A. Venkatraman v. the State,[29] the Supreme Court declared that Prevention of Corruption Act, 1947 applies only when the person accused is still a public servant.

The Supreme Court held in Mohammad Ghouse v. The State of Andhra[30] that the Government of Andhra is the appropriate authority under art. 311 to take action against the appellant, and it is for that authority to pass the ultimate order in the matter. 'The order passed by the High Court on January 28, 1954, is merely one of suspension pending final orders by the Government, and

such an order is neither one of dismissal nor of removal from service within the meaning of art. 311 of the Constitution. Under Rule 13 of the Madras Civil Services (Classification, Control and Appeal) Rules, it is the High Court of Judicature of Madras that is constituted as the authority which may impose suspension, pending enquiry into grave charges under Rule 17(e) against members of the State Judicial Service. The order falls within this rule, and is perfectly intra vires.'

In Parshottam Lal Dhingra v. Union of India[31] it was held by a majority of the Court that if a public servant has no right to the post,—as where he is appointed to a post either on probation or on an officiating basis—and whose temporary service has not ripened into quasi-permanent service, the termination of his employment does not deprive him of any right and cannot therefore by itself be punishment. If the Government has by contract, express or implied, or under the rules the right to terminate the employment at any time, such termination is not punishment and does not attract the provisions of article 311.

'The appellant had been promoted on July 3, 1951 to class II of railway service from class III and was reverted on an unsatisfactory report for the year ending March 31, 1953. His appeal to the General Manager of the Railway was unsuccessful. The Supreme Court held that 'article 311 makes no distinction between those who substantively hold a permanent post and those who hold temporary posts or persons officiating in permanent or temporary post. Clause (2) protects government servants against being dismissed, removed or reduced in rank without being given a reasonable opportunity of showing cause against the action to be taken. At the date of the commencement of the Constitution, the words dismissed, removed and reduced in rank as used in the service rules were well understood as denoting three major punishments which could be inflicted on government servants. It is only in those cases where the government intends to inflict these three forms of punishment that the government servants must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. If the termination of the service is sought to be brought about otherwise than by way of punishment,

then the government servant cannot claim the protection of clause 311(2). When a man is appointed substantively to a permanent post, the termination of the service of such a servant must per se by punishment. Where a person is appointed for a fixed term of years, the premature termination of the service of such a servant would be by way of punishment. When the service of a government servant holding a post temporarily ripens into quasi-permanent service as defined in 1949 Temporary Service Rules, he acquires a right to the post and therefore a termination of his employment, otherwise than in accordance with rule 6 of these Rules will prima facie be punishment so as to attract the application article 311. It was essential not only to give a charge-sheet and opportunity for an cxplanation in cases involving the disciplinary action of removal, but it was also incumbent upon the authorities to give opportunity for showing cause against the punishment which was proposed. Except in the three mentioned cases a government servant has no right to his post and the termination of his services does not, except in those cases, amount to a dismissal or removal by way of punishment. Thus where a person is appointed to a permanent post in Government service on probation, the termination of his services during or at the end of the period of probation will not ordinarily be punishment. Similarly if a servant is appointed to officiate in a permanent post or to hold a temporary post, the termination of the service of such a servant will not per se amount to dismissal or removal from service. One test for determining whether the termination of the service of a government servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had, termination would be punishment, and he will be entitled to the protection of article 311(2). If the government has, by contract or under the rules the right to terminate the employment at any time, then such termination in the manner provided by the contract or the rules is prima facie and per se not a punishment and does not attract the provisions of article 311. If the right to terminate the services exists, the motive operating on the mind of the government is wholly irrelevant. The Court has to apply two tests (1) whether the servant had a right to the post or

the rank or (2) whether he has been visited with evil consequences of the kind mentioned herein before.

'It is quite clear that the appellant was appointed to the higher post on an officiating basis. He had no right to continue in the post. The appointment was terminable at any time on reasonable notice by the government. From the order passed by the General Manager it is quite clear that it did not entail forfeiture of his chances of future promotion'. The appeal was dismissed with costs.

In State of U.P. v. Manbodhan Lal,[88] the Supreme Court interpreted Article 320(3)(c) and held that 'Chapter II containing article 320 does not in terms confer any rights or privileges on an individual public servant nor any constitutional guarantee of the nature contained in Chapter I of that part, particularly article 311'. It further held that 'the Constitution does not either in express terms or by implication provide that the result of non-compliance with the requirement of Article 320(3)(c) is to invalidate the proceedings ending with the final order of the Government'. The Supreme Court could not get away from the language of article 320 where the word 'shall' appears in almost every paragraph, and conceded that the word "shall in a statute is generally taken in the mandatory sense," but argued that "its use does not necessarily mean that unless the words of the statutes are punctiliously followed the proceeding or the outcome of the proceeding would be invalid". In P. Joseph John v. State of Travancore Cochin, the Supreme Court had held clauses 1 and 2 of article 116 directory only. It had however conceded that in order to determine whether there is compliance with these provisions all that is necessary to be seen is whether there has been any *substantial compliance* with them. In the instant case, the Supreme Court did not find that there had been any substantial compliance with the provisions of the Constitution. It conceded that 'there had been an irregularity in, though not the complete absence of consultation with the Public Service Commission.' It found that 'there was no consultation with the commission after the respondent had submitted his more elaborate explanation after the second show cause notice.'

But the Supreme Court also failed to notice that it was interpreting not a statute but a Constitution. It seemed to rely on Montreal Street Railway Co. v. Normandin.[84] But it was straining the observations of the Judicial Committee beyond what they seemed to have intended. For one thing, the Privy Council was interpreting a statute, not a Constitution. The English statute did not use the word 'shall'. The Privy Council in its judgment had said that 'when the provision of a statute would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them though punishable, not effecting validity of acts done'. The Supreme Court made no attempt to prove that the Constitution makers did not intend to bind the executive to the performance of its duty as laid down under article 320(3)(c), nor did it try to follow the Privy Council in holding that the neglect of these provisions was punishable as the Privy Council had implied in the case cited.

It is surprising to find the Supreme Court suggesting that once relevant *regulations* have been made by the executive or Parliament, they are meant to be followed in letter and in spirit, and yet holding that *provisions* in the Constitution need not be so followed.

The Supreme Court exaggerates the ill effects of holding clause (3)(c) of article 320 mandatory. If the dismissal of Manbodhan Lal by the Government of U.P. had been held invalid, as it should have been, no one would have been seriously affected. It is possible that some of the government servants who had been proceeded against without consulting the Public Service Commission could have claimed that the action taken against them was void and to no effect. It is presumed however, that the action taken by the Government of the U.P. or by other governments was so well taken that when the Public Service Commissions would have been consulted in the matter they would have upheld the actions taken. In rare cases, justice may have required the reinstatement of some of the public servants. Of course various governments would have been saddled with financial claims of their civil servants who may have been unjustly proceeded against. But this is not the sort of ill effect which the Privy Council had tried to guard against by its ruling which the Supreme Court

cited. The provisions of the Constitution which the Supreme Court has thus tried to read out of the Constitution form a part of the guarantees to the civil servants and did not stand on the same footing on which the English statute did.

The Supreme Court tried to brush aside guarantees to public servants by declaring that 'article 320(3)(c) of the Constitution does not confer any rights on a public servant'.

When a course of action is prescribed by the Constitution and not by a statute, it is difficult to see how a departure from 'a substantial, though not punctilious, compliance with' it does not afford a cause of action. If a statutory authority does not act in the prescribed way, it can certainly be directed to do so. By holding to the contrary in this case when a course of action has been prescribed for the executive, the Supreme Court has reduced the Public Service Commissions to the status of less than a statutory body. It has destroyed some of their vital functions by holding, as in this case, that the executive need not act on article 320(3) as no evil consequences are likely to follow by its non-observance, not even punishment for its non-observance. It is certainly a great fall. It is surprising that there was not a single dissenting voice to be heard in such an important matter. But the decision, though unanimous, it is the decision of a minority; of five justices out of a total of eleven. The majority may take a different view of the matter in another case which, one hopes, would be heard by the entire court.

NOTES

1 Satya Dev Bushari v. Padam Dev and Others, 1955 I S.C.R. 561.

2 Cf. Jones v. Attorney General (1956) 5 C.L. 423 in which Justice Streatfield voiced the English view of the relation between a civil servant and the Crown when he rejected the claims of the plaintiff for damages terminating his services because among other reasons, 'his employment was to continue during His Majesty's pleasure.'

3 State of Bihar v. Abdul Majid, 1954 S.C R. 786. The Supreme Court of Pakistan still follows the law as laid down by the Privy Council.

4 Shyamlal v. State of Uttar Pradesh, 1955 I S.C.R. 26.
Cf. State of Bombay v. Saubhagchand M. Doshi, A.I.R. 1957 S.C. 892.

5 Hartwell Prescott Singh v. Uttar Pradesh Government, A.I R. 1957 S.C. 892.

6 Mahesh Prashad v. The State of Uttar Pradesh, 1955 I S.C.R. 965.
7 P. Joseph v. The State of Travancore-Cochin, 1955 I S.C.R. 1011.
8 Ibid. 1021-22.
9 Ibid. 1023, 1024.
10 Ibid. 1024.
11 Om Prakash Gupta v. State of Uttar Pradesh, 1955 II S.C.R. 391.
12 Satish Chandra Anand v. The Union of India, 1953 S.C.R. 655.
Cf. also Gopal Krishna Potnay v. Union of India, A.I.R. 1954 S.C. 632.
13 The State of Madhya Pradesh v. G. C. Mandawar, 1955 I S.C.R. 599.
14 The State of Madras and another v. K. M. Rajagopalan, 1955 II S.C.R. 541.
15 Venkataraman v. The State of Madras, A.I.R. 1951 S.C. 229.
16 Rizwan-UI-Hasan and another v. The State of Uttar Pradesh, 1953 S.C.R. 581.
17 Shreekantiah Ramayya Munipalli v. The State of Bombay, 1955 I S.C.R. 1178.
18 Ibid. 1190.
19 Mahesh Prashad v. The State of Uttar Pradesh, 1955 I S.C.R. 968.
20 D. N. Banerji v. P. R. Mukherji and others; 1953 S.C.R. 318.
21 Matajog Dobey v. H. C. Bhari, A.I.R. 1956 S.C. 44.
22 Om Prakash Gupta v. State of U.P., A.I.R. 1957 S.C. 458.
23 Brij Nandan Sinha v. Jyoti Narain, A.I.R. 1956 S.C. 66.
24 Pradyat Kumar Bose v. The Hon'ble Chief Justice of the Calcutta High Court, A.I.R. 1956 S.C. 285.
25 H. P. Singh v. Thakur Prasad Tewari and another, A.I.R. 1953 S.C. 436
26 Shambu Nath Mehra v. The State of Ajmer, 1956 S.C.R. 205.
27 Banarasi Das and others v. The State of Uttar Pradesh and others, 1956 S.C.R. 357.
28 The State of Punjab v. Kharaiti Lal, 1956 S.C.R. 569.
29 S. A. Venkataraman v. The State, A.I.R. 1957 S.C. 107.
30 Mohammad Ghaus v. State of Andhra, A.I.R. 1957 S.C. 246.
31 Parshotam Lal Dhingra v. Union of India, A.I.R. 1958 S.C. 37.
32 State of U.P. v. Manbodhan Lal, A.I.R. 1957 S C. 912.
33 P. Joseph John v. State of Travancore-Cochin, 1955 I S.C.R. 1011.
34 Montreal Streat Railway Co. v. Normandin, 1917 A.C. 170.

CHAPTER X

THE SUPREME COURT AS A CRITIC

In the course of performing its main function of adjudicating between parties to a dispute, the Supreme Court sometimes indulges in 'asides' as well. Usually these take the form of comments on administration and legislatures. These comments have no legal value; they neither decide the question at issue, nor provide grounds for the decisions the Supreme Court may have pronounced. They are not even *obiter dicta*. These strictures reveal a non-judicial, though human, side of the work of the Supreme Court.

The workers of the Industrial Colliery Dhanbad sent a notice of their intention to go on a strike to the management. The Regional Labour Commissioner New Delhi, initiated conciliation proceedings. On October 22, 1949, the workers refused to participate in the conciliation proceedings. The conciliation officer sent his report to the Chief Labour Commissioner who received it on October 25. The labourers thought the conciliation proceedings were over and went on strike on November 7, more than a fortnight after the attempts at conciliation had broken down. It transpired however that the Chief Labour Commissioner did not send his report to the Labour Ministry till November 17. No strike is permitted during the 'pendency' of conciliation proceedings. The Supreme Court held the strike illegal as on November 7 the Central Government (the Ministry of Labour) had not yet received the report. The workmen had therefore to suffer all the consequences of an illegal strike.

'This hardship', the Supreme Court added in an aside, 'has been thrown upon the employees for no fault of their own but simply because of the callous indifference or utter inefficiency and slackness apparently prevailing in the office of the Chief Labour Commissioner'.[1]

Ram Narain Singh was arrested by the Police at Delhi on March 8 and produced before a Magistrate on March 9, 1953. He

challenged his detention by a writ of Habeas Corpus. In answer the court records were filed in the Court. These did not show what happened in the court below when the accused was produced before the magistrate though the accused was sent again to the judicial lock up. There was no order of the court remanding the case and sending the accused to the judicial lock up.[2] But subsequently "four slips were handed over to the Registrar of the Supreme Court purporting to be warrants of detention on one side and an endorsement on the other side, 'Remanded to judicial lock up till 11th March 1953'." The Supreme Court refused to take these 'slips' into consideration as court records and set the accused at liberty.

'Those who are called upon', the Supreme Court added, 'to deprive other persons of their personal liberty in what they concieve to be their duty must strictly and scrupulously observe the form and rule of law'.

While the legislature was not in session, the Government of Bombay issued the Bombay Building (Control of Erection) Ordinance in 1948. This made it necessary to obtain the permission of the Controller of Buildings before all or notified types of buildings in areas to which the Act was extended could be constructed. The Ordinance was in due course superseded by the Bombay Buildings (Control of Erection) Act, 1948. Between the enactment and repeal of the Ordinance, the Government issued a notification on January 15, 1948 extending the Ordinance to the whole of the State of Bombay, except the areas specified in a schedule, so far as buildings used for public amusement or entertainment were concerned. The act repealed the Ordinance and apparently also the notifications issued under it; it was made applicable to areas notified in a schedule to the Act. But S. 15(1) of the repealing Act declared :—

'The provisions of clauses 7 and 25 of the Bombay General Clauses Act, 1904 shall apply to the repeal as if that Ordinance were an enactment.'[8]

Now this tailpiece had the effect of keeping alive the notification extending the Ordinance to the whole of the province of Bombay so far as places of public amusements were concerned. But if this

was what the legislature intended, it could have easily incorporated the notification in the schedule to the repealing Act. That it did not do so, raised grave doubts about its intentions. When construction of a cinema house was undertaken in the district of Ratanagiri, the builders were prosecuted for contravening the Bombay Buildings (Control of Erection) Act, 1948[4]. The legislature had expressed its intention so inadequately that both the trying magistrate and the High Court held the accused not guilty. On appeal by the Government of Bombay the Supreme Court convicted the accused but declared :—

'The manner adopted by the legislature in keeping alive the notification issued under the Ordinance by use of somewhat involved language in matters where rights of citizens regarding construction of buildings are being affected was not very happy. It should have been much simpler if the legislature had made its intentions clear by the use of simple and unambiguous language'[5]

Ram Prasad Narain Sahi, a distant relation of the proprietors of Bettiah Estate in Bihar obtained on lease from the Court of Wards (acting for the disqualified proprietress) about 200 bighas of land on the prevailing rate of rent but on paying, along with several others, half the usual premium payable on acquiring possession. In June, 1950 the Bihar Legislature passed the Sathi Lands (Restoration) Act whereby it purported to cancel the lease in favour of Ram Prashad Narain Sahi declaring it null and void. The Collector was authorized to eject him if he refused to hand over the possession. The lessee applied to the Patna High Court for a writ of mandamus restraining the Government of Bihar from taking any action under the Act as, he alleged, it was unconstitutional and void. The High Court refused the writ where upon the lessee appealed to the Supreme Court. The Court held the Act unconstitutional and void under Article 14 of the Constitution as it revealed 'a worse form of discrimination than the *one* which differentiates a particular individual from all his fellow subjects and visits him with a disability which is not imposed on anybody else and against which even the right of complaint is taken away.' The Supreme Court went on to say:

"A political organization of the party in power decides that the settlement in question was 'contrary to the provision of law and public policy' and the State legislature basing itself on such a declaration purports to declare the settlement null and void. The reason given for this extra-ordinary procedure are indeed remarkable for their disturbing implications. It is said that there was agitation among the tenantry of the locality and opposition on the part of persons living in the locality against the appellant's possession of the land which led to a breach of the peace and institution of criminal proceedings. Whenever a section of the people living in a locality in assertion of an adverse claim disturbs a person in the quiet enjoyment of his property, the Bihar Government would seem to think that it is not necessary for the police to step in to protect him, but the legislature could intervene by making a 'law' to oust the person from his possession. Legislation such as we have now before us is calculated to drain vitality from the rule of law which our Constitution so unmistakably proclaims".[6]

There was an industrial dispute between the Minerva Mills and its workers. Under the Industrial Disputes Act, the Government of Mysore referred the case for decision to an Industrial Disputes Tribunal constituted to last for two years. When the life of the tribunal came to an end a new notification was issued and the case was notified to be continued before the new tribunal. The Supreme Court[7] held that the Government had ample power of constituting a tribunal for a limited period. It rebutted the contention that the Government could not withdraw the dispute referred to the first tribunal, thus created, nor hand it over to the second tribunal when the first tribunal became extinct. 'All that the first tribunal had done in the dispute was to frame the issues. If any party has any objections to the issues so framed, it will be open to the new tribunal to frame the issues. The notification constituting the second tribunal did not prevent it from hearing the dispute de novo'. But the Supreme Court also conceded:

'It is true that this notification (constituting the second tribunal for inquiring into an industrial dispute in Mysore) is not happily worded. Substantially the notificiation must be taken to have been made under section 7 (of the Mysore Industrial Disputes Act).

Reference to section 8 and to vacancy in the notification are in the nature of surplusages and are the result of confused thinking on part of those responsible for this notification'.

Madan Gopal carried on business in the district of Jodhpur in Rajasthan. When the Constitution of India came into force on January 26, 1950 Rajasthan became a Part B State in the Union. The Constitution repealed Government of India Act, 1935 which by its Section 101 had imposed restriction on the Government of India restraining it from making laws for an acceeding State inconsistent with the Instrument of Accession whereby the State had joined the federation. With the repeal of the Act and the coming into force of the Constitution the Union Government became free from this restriction and could make laws for all States in the Union subject to conditions laid down in the Constitution. The Indian Finance Act, 1950 subjected the whole of India to income-tax and super tax. The appellant was called upon to submit a return of his income for the year ending on March 31, 1950 for assessment to income-tax. He contested the right of the Union Government to levy income-tax 'on the ground that the income which accrued to him or was received by him prior to April, 1, 1950' was not liable to income-tax 'under the provisions of any law validly in force in Rajastan'. The High Court of Rajasthan granted him a writ restraining the Union Government from levying income-tax on him. In appeal, the Supreme Court held that under the Indian Finance Act, 1950, the appellant was liable to pay income-tax in 1950, that if under the scheme for the assessment and payment of the income-tax in India, this involved payment of the tax on the income for a period for a part of which Rajasthan was not subject to the Indian Income-Tax Act, this was covered by the provisions of the Indian Finance Act, 1950 and allied laws. The decision turned to a large extent on the definition of taxable territories in the Finance Act. The Supreme Court added :—

'The new clause (Section 2) of the Indian Finance Act defines taxable territories. The definition, it may be observed in passing, is by no means a model of perspicuity. Parts of it seem redundant and even mutually contradictory'.[8]

Rao Shiv Bahadur Singh was a Minister of Industries in

Vindhya Pradesh. It was alleged that he demanded a bribe from Panna Diamond Mining Syndicate before rescinding an earlier order to stop its mining operations in certain lands in Vindhya Pradesh. It was suggested that Sir Manubhai should see Rao Shiv Bahadur Singh on behalf of the Syndicate in Delhi on October 7, 8 or 9, 1949. Sir Mannubhai's personal assistant, Nagin Das, fixed a meeting with Rao Shiv Bahadur Singh at 31, Constitution House at 10-30 a.m. Nagin Das meanwhile informed the police. He met Rao Shiv Bahadur Singh who is said to have demanded Rs. 20,000 before resumption of mining operation was permitted. Nagin Das did not have money enough to tender the bribe and therefore suggested that he would meet Rao Shiv Bahadur Singh on October 11 at 3 p.m. When Nagin Das met Rao Shiv Bahadur Singh again at 3 p.m., it was decided that for Rs. 25,000, Rao Shiv Bahadur Singh would not only permit the resumption of mining operations but renew the lease for another ten years. Nagin Das undertook to pay the money the same night.

Nagin Das had kept the police informed of his negotiations. As he had not received the money from Bombay, the police made over Rs. 25,000 in marked currency notes of Rs. 100 of which they prepared a record. Nagin Das went to the Constitution House, met Rao Shiv Bahadur Singh in his bed room and received an order of resumption for ten years. He paid Rao Shiv Bahadur Singh Rs. 25,000 in currency notes which the police had given to him. On a preconcerted signal, the additional district magistrate and the raiding party rushed in. They recovered the marked currency notes from an upper drawer of the bed room of Rao Shiv Bahadur Singh. He was prosecuted and convicted by the judicial commissioner. On appeal the Supreme Court upheld the conviction for bribery but observed:—

'We cannot however leave this case without expressing our strong disapproval of the part which the police authorities and Shanti Lal Ahuja, the additional district magistrate, took in this affair. This offence would never have been committed but for the fact that the police authorities provided Nagin Das with the wherewithal of the commission of the offence (by the accused). The part which Shanti Lal Ahuja, the additional district magistrate,

took in this affair cannot be too strongly condemned. Even though he was a member of the judiciary he lent his services to the police authorities and became a limb of the police as it were. The independence of the judiciary is a priceless treasure. It is of the essence that public confidence in the independence of the judiciary should not be undermined by any such tactics adopted by the executive authorities'.[9]

Tolaram Relumal was said to have received from Shankar Das Gupta through Mathura Das on November 23, 1950, a sum of Rs. 2,400 as pugree in respect of the grant of the lease of a block in a building under construction. When the building was completed, it was requisitioned by the Controller of Accommodation under Bombay Land Requisition Act, 1948. Shankar Das Gupta thereupon gave information and Tolaram Relumal was prosecuted under the Bombay Rents Control Act, 1947. He was convicted by the trial magistrate. On appeal a single judge of the High Court acquitted him. But another bench in a similar case had held differently and the case was referred to a full bench. The full bench reversed the judgment of the single judge and held that the payment had been made in respect of a lease of a building and therefore dismissed the appeal. The Supreme Court heard the case in appeal on a certificate from the High Court. The Court accepted the appeal and quashed the conviction of the accused holding that the payment could not be in respect of a lease when there was no lease in existence nor any certain chances of lease. The question of the intentions of the legislature in the matter having been raised, the Supreme Court observed :—

'If the Legislature intended to punish persons receiving pugree for merely executory contracts, it should have made its intention clear in unambiguous language'.[10]

In Vashistha Narain Sharma v. Deo Chandra and others[11] the Supreme Court was hearing an appeal against the decision of an Election Tribunal. Deo Chandra had alleged that the nomination paper of one of the candidates had been improperly accepted. The tribunal found this contention proved and accepted the prayer of the petitioner that the election of Vashistha Narain be set aside as the result of the election had been materially affected by the im-

proper acceptance of the nomination paper of Dudh Nath, one of the candidates.

On appeal the Supreme Court held that the petitioner Deo Chandra had not discharged the onus of proving by adducing proper evidence that the result of the election had been materially affected by the improper acceptance of the nomination paper of one of the defeated candidates and reversed the decision of the Election Tribunal. It added:

'The English Ballot Act indicates that an election is not to be held invalid if it appears to the Tribunal that any mistake did not affect the result of the election. This places the onus of proof on the person who seeks to uphold the election. The language of the Section 100(1) (c) of Representation of the People Act, however, clearly places a burden on the applicant who alleges that the result of the election has been materially affected. The question is one of fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence the only inescapable conclusion is that the burden is not discharged and the election must stand'.

After thus expounding the law the Supreme Court added :—

'Such result may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of nomination paper. How this state of things can be remedied is entirely for the legislature to consider. The English Act presents no such conundrum and lays down a perfectly sensible criterian upon which the tribunal can proceed to declare its opinion'.[18]

In Rananjaya Singh v. Baij Nath[18] and others the Supreme Court held that the gist of the corrupt practice defined in section 123(7) of the Representation of the People Act is that the employment of extra persons and incurring or authorizing of excess expenditure, must be by the candidate or his agent. 'A candidate cannot be held to be guilty of the corrupt practice merely because a number of persons employed in the estate of his father worked for him in election and if these persons and the remunerations they received from his father were included, the maximum number of persons that a candidate could employ on payment and the expenditure that they might incur would be exceeded'. They however went on to say:—

'If all that can be said of these statutory provisions is that construed according to the ordinary, grammatical or natural meaning of their language they work injustice by placing the poorer candidates at a disadvantage, the appeal must be to Parliament'.[14]

In Razwan-ul-Hasan and another v. The State of U.P.[15] the Courts acquitted two public servants of contempt of court in circumstances which have been described elsewhere. During the course of their judgment they said, "The conduct of the Secretary of District Congress Committee in writing a recommendatory letter about the facts of the case to the District Magistrate was undoubtedly a communication for the purpose of influencing his decision and was rightly reprobated by the High Court. Such a course is calculated, if tolerated, to divert the course of justice and ought more frequently than it is, to be treated as what it really is, namely, a high contempt of court."

In Ram Singh and others v. The State of Delhi and another,[16] the Supreme Court held the preventive detention of Professor Ram Singh, Bal Raj Khanna and Ram Nath Kalia legal. The appellants were alleged to have made speeches in Delhi on certain dates which were in the opinion of the District Magistrate likely to create disaffection between Hindus and Muslims. The question before the Court was whether grounds of detention supplied to the detenues were such as to make it possible for them to offer an adequate representation against them. The majority of the Court held that they did and dismissed the petition. In dissent, Bose, J. declared:—

'All that is required is that the authorities should bestow on these detenues a very small fraction of the thought, time and energy which the law compells in the case of even the meanest criminal who is arraigned before the courts of this country. The fact that there is absent in the case of these persons all the usual safeguards, the glare of publicity, the right to know with precision the charge against him, the right to speak in his own defence, is all the more reason why Government should be thoughtful, considerate and kind and should give them the maximum help. In any case that, in my opinion, is what the Constitution requires.'

In the Dominion of India and another v. Shririnbai A. Irani

and another while finding for the appellant, the Supreme Court observed:—

'It is unfortunate for the first respondent to be pitted against the Dominion of India and to consider that this was a test case and the matter had to be fought out in detail in as much as it affected a series of cases and the properties involved would be considerable as alleged by Seervai before the court below.' [17]

In Purushotam Govindji Halai v. Shri B. M. Desai, Additional Collector of Bombay and others,[18] though the Court upheld the different methods prevailing in various parts of the country for realizing the arrears of income-tax, Justice Bose added in dissent.

'Speaking broadly, for the enforcement of the levy of a central tax like the income-tax there should be uniformity of procedure and identity of consequences for non-payment.'

In M. Y. Shareef and another v. The Honourable Judges of the High Court of Nagpur and others,[19] the Supreme Court accepted the full apology tendered by the appellants for the contempt of the High Court of Nagpur and added :—

'We cannot help observing that the admitted reference by the Judges (of the High Court) to the Supreme Court in their remarks during the course of the hearing was unfortunate and seems to indicate an unnecessary and indecorous sensitiveness which may well have been misunderstood by the party and the advocates'.

In the Chamber of Commerce Hapur and three others v. The State of Uttar Pradesh and two others[20] after deciding the case in favour of the appellants the Supreme Court went on to say:—

'Before concluding we desire to express our strong disapproval of the wholly unwarranted attitude adopted by the officers of the State of Uttar Pradesh. The officers of the State have sought to circumvent the decision of the Court on flimsy pretext and to challenge its correctness on an obviously untenable plea which has not even the merit of a seeming plausibility. The conduct verges dangerously on a contempt of this Court. We desire to make it quite clear that we view with great disfavour such unworthy attempt to get round the decisions of this court.'

In Ramchandra v. Shankar Rama,[21] the Supreme Court held that the order of the Chief Minister, Hyderabad must be taken to

be a competent, valid and final order in so far as it relates to the Atiyat and Jagir property. The order held that Ramachandra Reddy, adopted son of Lakshmayamma, has the legal title to the property in dispute, but deferred the release of the estate from the Court of Wards for the present. 'This', the Supreme Court declared, 'undoubtedly leads to a very anomalous situation and may have the effect of indefinitely continuing the administration of the Court of Wards over the property. These are matters however which do not concern the Court in an application for the issue of a writ.'

In Vikram Das v. Daulat Ram,[22] the Supreme Court dismissed the appeal subject to certain modifications of the decree. The suit related to an ancient thakurdwara known as Amalipur Asthan. The Court added: 'We cannot shut our eyes to the fact that we have before us a public trust of which, on the facts before us, an alleged intermeddler claiming under a decree said to be void is in possession and management. But these are not matters we need decide in these proceedings. All we need do is to bring the present state of facts to the notice of the Advocate-General of U.P. and leave him to consider whether he should not, of his own motion, institute proceedings under section 92 Civil Procedure Code or take other appropriate steps. Let a copy of this judgment be sent to him,"

In R. G. Ruia v. State of Bombay[23] a complaint had been made that the case had remained pending for more than 9 years. The Supreme Court observed: 'The record as prepared at the instance of the appellant runs into eleven big volumes, running into 5,700 closely printed pages. Of these volumes only the first three have been referred to in the course of arguments at the bar, only portions of them. The remaining eight volumes have all gone waste. The case is a very telling illustration of waste of public time and private funds. Even after the receipt of the records the parties between them have succeeded in preventing the case from being put up for final hearing and disposal for another three years. The Court must look with great disfavour upon and publicly denounce the way in which the appeal has been prosecuted during the last more than five years.'[23]

NOTES

1 Workers of the Industry Colliery, Dhanbad v. The Management of the Industry Collierty; 1953 S.C.R. 428.
2 Ram Narayan Singh v. The State of Delhi and others. 1953 S.C.R. 652.
3 The State of Bombay v. Pandurang Vinayak Chaphalkar and others, 1953 S.C.R. 777-78.
4 Ibid 773.
5 Ibid 773.
6 Ram Prasad Narayan Sahi and Another v. The State of Bihar and others, 1953 S.C.R. 1129.
7 Minerva Mills Ltd. v. Their workers, 1954 S.C.R. 465.
8 The Union of India v. Madan Gopal Kabra, 1954 S.C.R. 541.
It is an irony of history that the judgment of Patanjali Sastri; C.J., in this case declaring that "there remained no state law for income-tax in operation in any part B State in the year 1949-50" had to be re-interpreted by Justice Kapur in Commissioner of Income-Tax v. Patiala Cement Co. (A.I.R. 1957 S.C. 691). He declared that the ycar 1949-50 in the judgment is the accounting year 1949-50.
9 Rao Shiv Bahadur Singh and Another v. The State of Vindhya Pradesh, 1954 S.C.R. 1098.
10 Tolaram Relumal and Another v. The State of Bombay, 1955 S.C.R. 166.
11 Vashist Narain Sharma v. Deo Chandra and others, 1955 I S.C.R, 509.
12 Ibid., 514.
13 Rananjaya Singh v. Baijnath Singh and others, 1955 I S.C.R. 671.
14 Ibid., 676.
15 Rizwan-Ul-Hasan and Another v. The State of Uttar Pradesh, 1953 S.C.R. 472.
16 Ram Singh and others v. The State of Delhi and Another, 1951 S.C.R. 472.
17 The Dominion of India and another v. Shirinbai A. Irani and another, 1955 I S.C.R. 215.
18 Purshottam Govindji Halai v. Shree B. M. Desai, Additional Collector of Bombay and others, 1955 S.C.R. 906.
19 M. Y. Shareef and Another v. The Hon'ble Judges of the High Court of Nagpur, 1955 I S.C.R. 766.
20 The Chamber of Commerce, Hapur and three others v. State of Uttar Pradesh, 1955 I S.C.R. 848.
21 Ramchandra v. Shanker Rama, A.I.R. 1956 S.C. 319.
22 Vikram Das v. Daulat Ram, A.I.R. 1956 S.C. 282.
23 R. G. Ruia v. State of Bombay, A.I.R. 1958 S.C. 103.

CHAPTER XI

THE SUPREME COURT RESOLVES A CLASH

In criminal appeals against a conviction for murder an appellant may have been jointly charged with others either with conspiracy or rioting resulting, among other things, in murder. Some times the joint charge failed, rioting and conspiracy with intent to murder could not be proved and all but one accused were acquitted either by the Sessions Judge or the High Court. The appellant may sometimes have been held guilty of murder, though he might not have been charged of murder specifically.

In Nanak Chand v. the State of Punjab[1], the appellant along with others had been charged with rioting resulting in murder. The trial court held that the charge of rioting was not proved. But it held the accused and three others guilty of murder committed by them in furtherance of the common intention of all. The High Court held that there was no common intention to murder but convicted Nanak Chand alone of murder and sentenced him to death. Nanak Chand appealed to the Supreme Court by special leave.

The case was heard by S. R. Das, Bhagwati and Syed Jafer Imam JJ. On January 25, 1955, Justice Imam delivered the unanimous judgment of the Court. 'The principal question of law to be considered', he declared, 'is as to whether the appellant could legally be convicted for murder and sentenced when he was not charged with that offence'. On behalf of the unanimous Court the judgment declared, 'We are of opinion that a person charged with an offence read with section 149 (I. P. C., unlawful assembly and rioting) cannot be convicted of the substantive offence without a specific charge being framed.' The Court noted the argument for the prosecution that section 535 of the Indian Criminal Procedure Code provided 'that no finding or sentence pronounced shall be deemed invalid merely on the ground that no charge was framed'. Its attention had been drawn to 'the provision which permits a court of appeal or revision to set aside a finding or sentence if, in its opinion, non-framing of a charge has resulted in a failure of

justice'. The judgment chose to ignore both, probably because it considered 'non-framing of a charge resulting in a failure of justice' as an additional ground for setting aside a sentence and not the *only* ground. The judgment refers to other grounds for setting aside a sentence in section 537—an error, omission or irregularity—but adds that 'in the present case there is no question of any error, omission or irregularity because no charge under section 302 was in fact framed'. Borrowing the phraseology made current by the Privy Council earlier, it declared :—'in the present case we are of opinion that there was an *illegality* and not an *irregularity* curable by the provisions of section 535 and 537.'

After going so far the Court, probably by way of abundant caution added; 'Assuming, however, for a moment that there was merely an irregularity which was curable, we are satisfied that in the circumstances of the present case the irregularity is not curable because the appellant was misled in his defence by the absence of a charge under section 302 I.P.C.'[2] The appeal was allowed and the case of the appellant was remanded to the Court of Sessions for retrial.

In Suraj Pal v. The State of Uttar Pradesh,[3] the appellant along with 19 other accused, was convicted and sentenced by the trial court for rioting and unlawful assembly having a common object and resulting in murder. On appeal ten of the accused were acquitted, the sentences of nine were modified but the sentence of transportation for life passed on Suraj Pal for murder was confirmed by the High Court of Allahabad. The appeal of Suraj Pal by special leave was heard by Justices Vivian Bose, Jagannadha Das and B. P. Sinha. The judgment of the unanimous court was delivered by Justice Jagannadha Das on March 1, 1955.

In this case the conviction by the trial court of the ten accused for rioting had been confirmed but the High Court held that 'neither the attempt on the life of Bisheshwar nor the actual death of Suraj Din can be said to have been in prosecution of the common object of the unlawful assembly.' It held therefore that none of the accused could be found guilty under section 149 and set aside their convictions and sentences but held Suraj Pal guilty under sections 307 and 302 and maintained his conviction.[8]

As in Nanak Chand v. State of Punjab, the Supreme Court declared: 'there have been no direct and individual charges against the appellant for the specific offences under sections 302 and 337'. 'The question that arises', Justice Jagannadha Das went on, 'is whether without such direct charges the convictions and sentences for those offences can be maintained'. His answer however did not turn upon an incurable illegality which had characterized the judgment in Nanak Chand's case. Instead he said, 'In a case so serious as that which involves the sentences of transportation for life and of death and particularly in a case like the present one, where the death sentence has been awarded in the trial court by distinguishing this appellant from all other accused in respect of his individual act by way of pistol fire, it is difficult to say that the accused has not been prejudiced by the absence of specific charges under sections 302 and 307. In all the circumstances above noted, we are satisfied that the absence of specific charges has materially prejudiced the appellant. We must accordingly set aside the conviction and sentence of the appellant under sections 307 and 302 and direct that there shall be a retrial'.

The 'abundant caution' of the earlier case had now become the rule. Thus there was apparently a conflict between the two decisions. Naturally the question arose; "Where there is a charge against an accused under section 302 read with s. 149, if section 149 is inapplicable to the facts, can the accused be convicted under s. 302 without a separate charge?" In the first case it was held that the omission to frame a specific charge under s. 302 amounted to an illegality. In the latter case the view seems to be taken that it may sometimes be considered a mere irregularity, curable if no prejudice had been caused to the accused.

When William Slaney came up to the Court in appeal against his conviction under s. 302 when no charge under that section had been specifically framed against him, the Supreme Court seems to have been faced with the question whether there was a conflict of views between the two decisions and if so to determine it.[4] Slaney had not been charged with rioting or being a member of an unlawful assembly with the common object of murder. Instead he had been charged jointly with his brother under section 302 read with section

34. But, in Nanak Chand v. State of Punjab it had been stated specifically that 'the parallel case under section 34 stood on the same footing' on which a case under section 302 read with section 149 stood. Instead of the usual bench of three judges, a bench of five judges—S. R. Das, Acting Chief Justice and Justices Bose· Jagannadha Das, Chandrasekhar Aiyar and Jafer Imam—was constituted to resolve the issue. Justices S. R. Das and Jafer Imam had heard Nanak Chand v. the State of Punjab. Justices Vivian Bose and Jagannadha Das had sat on the bench which decided Suraj Pal v. the State of the Uttar Pradesh. Justice Chandrasekhar Aiyar was a new addition. He had retired from the bench earlier but had been invited to join the Court for about two months.

Three judgments were delivered in the case. Justice Imam failed to discover, 'on a careful examination of the two *cases*', 'any *substantial* conflict between them'. By making the abundant caution of his earlier judgment in Nanak Chand's case the rule, he now interpreted that decision to have held that the trial was invalid because 'the accused had been misled in his defence'. Justice Chandrashekhar Aiyar speaking for himself and Justice Jagannadha Das, held that 'the omission to frame a charge is a grave defect. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted.' 'In the main', he continued, 'the provision of section 535, would apply to cases of inadvertance to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification and where the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged. In such cases mere omission of a charge would not constitute an illegality' and 'the conviction need not be set aside, unless, in fact a failure of justice has resulted'. But 'where there is no charge at all from start to finish, or where there is a deliberate breach of the requirement that it be in writing and explained to the accused, or where the conviction is for a totally different offence and not covered by sections 239 and 237, or where conviction is for a major offence whereas the charge was for a minor

offence', 'the omission to frame a separate and specific charge will be an incurable irregularity amounting to an illegality, prejudice or no prejudice' . . . Justice Bose speaking for himself and the acting Chief Justice Das opined; 'An omission to frame a charge is an irregularity that does not vitiate or invalidate a conviction unless there is prejudice.' He made an attempt to reconcile the decision in Nanak Chand's case with this view of the law but in view of the fact that Justice Imam who wrote the judgment of the Court in that case was still unrepentant, he gladly conceded that 'some of the expressions used in the judgment travelled wider than this', (his view of the law). He hastened to add that 'what the judges had *in mind*, was the fact 'that patent prejudice was disclosed' and 'it was *found* that the appellant had been misled in his defence'.[5]

In view of the fact that Justice Imam agreed with Justice Chandrasekhar Aiyar and Justice Jagannadha Das, what is the rule of the Supreme Court in the matter to-day? Only Justice Bose[6] and Justice Das would require prejudice to the accused being *found* before upsetting a finding in a case where the accused is sentenced for an offence with which he had not been charged. The three other judges were prepared to presume, under certain circumstances, that the accused had been handicapped in his defence by being charged with one offence and convicted for another.[7] Which set of judges will hear the next case?

In 1956 Sukha and others v. State of Rajasthan[8] reached the Supreme Court by way of special leave to appeal. The appellants argued in the Supreme Court that though they had been convicted under sections 302 and 149 by the High Court, they had never been charged under those sections. As the appellants had not raised this question in the High Court nor in their petititon for special leave to the Supreme Court, the Court declined to allow the question to be raised now and rejected the appeal.

In an obiter dictum Justice Bose for the unanimous Court summarized the decision of the Supreme Court in William Slaney v. State of Madhya Pradesh thus:—'We will be slow to entertain question of prejudice when the details are not furnished; also the fact that the objection is not taken at an early stage will be taken

into consideration'.[9] One wonders where it leaves the lower Courts who have to follow the law laid down by the Supreme Court.

NOTES

1 Nanak Chand V. State of Punjab 1955 I S.C.R. 1201.
2 Ibid. 1214.
3 Suraj Pal v. State of Uttar Pradesh. 1955 I S.C.R. 1332.
4 William Slaney v. State of Madhya Pradesh 1955 2 S.C.R. 1140.
5 Ibid 1195.
6 Ibid 1175.
7 Ibid. 1190.
8 Sukha & others v. State of Rajasthan 1956 S.C.R. 288.
9 Ibid. 302; cf. the confusion caused in the U.S. by the Supreme Court's Fair Trial Rule. Justice Roberts in Betts v. Brody, 316 U.S. 462 (1942) declared, 'asserted denial' (of due process) 'is to be tested by an appraisal of the totality of facts in a given case.' 'This prohibits the conviction of one whose trial is offensive to the common and fundamental idea of fairness and justice'. Justice Frankfurter in Malinski v. New York, 324 U.S. 417 (1945) substituted, 'the notion of justice of English-speaking people' for 'the common and fundamental ideas of fairness'

In Shyam Behari v. State of Uttar Pradesh the Supreme Court held that even if the accused could not be convicted under Section 396 he could be convicted under Section 302; murder being one of the ingredients of offence under Section 396 and the ingredient having been proved against the accused who, so far as he was concerned knew from the charge which was framed against him that he was sought to be made responsible not only for the commission of dacoity but also for the commission of murder in committing such dacoity. The accused could be convicted of the offence under Section 302 Indian Penal Code since such a charge could be made out against him.' A.I.R. 1957 S.C. 320.

CHAPTER XII

STARE DECISIS AND THE SUPREME COURT

When the highest Court in a country decides a case, its decision becomes binding upon the lower courts. The Indian Constitution specifically lays down that the law declared by the Supreme Court is binding on all courts.[1] Technically 'the law' may be said to reside elsewhere than in the decisions of the Supreme Court. It may well include statutory law, delegated legislation and custom. But the law as contained in statutes, rules, regulations, orders and byelaws has to be interpreted i.e., applied to a case in court and its precise meaning established. The decisions of the Supreme Court thus interpret the law and in doing so may expand or restrict its field of operation. The interpretation of the law by the Supreme Court becomes the law in action in India.

Citizens as well as the States base their conduct on the law as they understand it, as it has been declared by the highest court. It would normally be manifestly unfair to decide a case by changing the current interpretation of the law. A case in court examines the past conduct of parties. This is usually based on the current interpretation of the law. The examination of such past conduct may take place in the highest court a long time after the events, pronouncing judgment on such conduct by a new interpretation of the law would make application of such law retrospective and therefore normally unjust[2].

Judges and lawyers thus maintain that a case is usually best decided by the application of the law as declared in earlier cases to the case in court. But 'a case may be different on its facts, or one analogy better than another, or a void may exist which enables a judge to legislate, particularly when the phrase to be interpretated is as broad as interstate commerce' in the Constitution of the United States or reasonable restrictions on fundamental rights in the Constitution of India. The courts under such circumstances very often try to maintain that they are not departing from their previous decisions. They try to 'distinguish' the new case from the

old. In one case they may hold that 'the right principle' underlying the old decision is still applicable even though the decision is not. In another case they may assert that they still hold the old 'decision' applicable even when they reject the argument underlying that decision to the precise question involved therein and distinguish the new case from the old. As the Supreme Court observed in Gurbachan Singh v. State of Punjab,[3] 'on facts no two cases can be similar'. A new interprepation may therefore be based on meticulously distinguishing the facts in one case from another. Occasionally a court may interpret an old decision in such a way as to put into its shell a new stuffing. Homage thus continues to be paid to precedents without allowing them to stifle social evolution.

Some of these distinctions may arise because of the failure of the lawyers engaged in a case to present it fully to the Court. In the highest court the lawyer is in reality an officer of the Court. He has to present his client's case as fully as he can. His failure to do so may lead to a wrong judgment which may have to be changed later on. Thus in Satya Deo Bushahri v. Padma Dev and others[4] the Supreme Court decided that Himachal Pradesh, a Part C State, was not governed by the central government. 'The President who is the executive head of the Part C State is functioning as the head of the State under powers specifically vested in him under article 239. The President occupies in regard to the Part C States a position analogous to that of a Governor. Under the provision of article 239, Part C States do not cease to be States.'

When the attention of the court was drawn to section 3 (8) of the General Clauses Act later on in review,[5] it held that the central government included the Chief Commissioner administering a Part C State under authority given to him under article 239. It is true that if the Court had given a little more thought to the question in the first instance, it could not but have discovered that the President could neither govern a Part C State as a Governor or a Rajpramukh governs part A or part B State nor in any other fashion except through the central government.

Similarly in Lachhmandas Kewalram Ahuja v. The State of Bombay[6], the Supreme Court decided on May 20, 1952 that the

Bombay Public Safety Measures Act became void as soon as the Constitution came into force because its provisions offended against the fundamental rights guaranteed under the Constitution. The Act authorized the executive to refer any *case* to a special session judge appointed by it to try any *case* referred to it by the Government. The Court quashed the sentence passed on Lachhman Das and ordered that he be tried according to law. It was held that as the Bombay Act discriminated against the accused, it was void at least so far as trial by the special session judge of any *case* referred to him was concerned.

On January 19, 1953, however, the Supreme Court upheld the conviction of and the sentence passed on Qasim Razvi under Hyderabad Special Tribunal Regulation of 1953 Fasli which similarly discriminated against the accused. Though the law was bad, the Court raised a further question, whether or not, the accused had been actually discriminated against by having his trial continued under the Regulation after the Constitution had come into force. It held that as the accused had not been adversely affected materially in the portion of the trial held after the Constitution had come into force, his conviction under the Hyderabad Special Regulation was not bad. It distinguished this case from Lachhaman Das Ahuja's case by conceding that in the former the question of how the accused had been actually affected by the provisions of the Bombay Public Safety Measures Act had neither been raised nor considered[7].

But the process of distinguishing one case from another need not rest on the forensic efforts of the lawyers alone. In the Bharat Bank Case the Court had to decide whether an Industrial Disputes Tribunal consisting of three members could still function as such even when one of the members had left the Tribunal and the award was signed by the remaining two members only. The majority of the Court (Kania, Patanjali Sastri, Fazl Ali and Mukherji) decided on May 26, 1950 that if one of the members ceases to be available, it is not obligatory on the Government to appoint a new member.[8] They held therefore that the award given by the two members was valid and dismissed the appeal.

The Court was confronted with the same problem in the United Commercial Bank and others case. The Bharat Bank award

had been given while only two members were present. But the third member who had been absent during the signing of that award, 'resumed' his duties on the Tribunal on Feb. 20, 1950 and the three members of the Tribunal gave an award on July 31, 1950. The United Commercial Bank and other appellants contended in the Supreme Court that this award was without jurisdiction and should be set aside. In some of the connected appeals it was also contended that the awards given by two members between November 23 and Feb. 19 were also without jurisdiction.

The majority of the Supreme Court (Kania, Mahajan, Das and Bose) now held that the awards given by the two members of the Tribunal were without jurisdiction as also the award given by the Tribunal of three members after the third member 'rejoined' the Tribunal. The dissenting opinion of Justice Mahajan in Bharat Bank case was now adopted as the decision of the Court and it was held on April 9, 1951, that 'the work of the two members cannot be treated as the work of a Tribunal established under the Act and all their actions are without jurisdiction.'[9]

It is interesting to note that there is no reference in the later judgment to the earlier decision of the Court. It is possible, however, to distinguish the latter case from the former by the wealth of information that seems to have been made available in the second case.[10] The majority of the Court in the earlier case seems to have occupied itself more with asserting the right of the Supreme Court to hear appeals by special leave from the decisions of the tribunals than with 'the merits of the case'.

Anwar Ali Sarkar was tried in a special court set up to try such cases as were referred to it by the Government under the West Bengal Special Courts Act, of 1950. The Act, among other things, empowered the Government to set up a special court for the trial of *any* case referred to it by the Government. A special procedure was laid down for the special Court. This procedure was 'less advantageous to the accused than the ordinary procedure'. 'Preliminary enquiry before committal to the Session, trial by jury or with the aid of assessors, the right of a *de novo* trial on transfer of his case from one court to another have been taken away'. Under the Act, 'if evidence tendered during the trial discloses that the accused had

committed a major offence, other than the one he was charged with, he can be punished for it.' 'The right of revision in the High Court has been taken away entirely. To a certain extent the remedies to which an accused person is entitled in higher courts have been cut down.' The Supreme Court in appeal held that Anwar Ali had been discriminated against in that he was tried under a procedure which was less advantageous to him than the normal one. The Court failed to discover any valid ground for the discrimination to which he had been subjected. The Act authorized the special courts to 'try such cases' as the Government cared to refer to them. The notification setting up the courts declared that they were to try specific cases—not classes of cases—that were sent up to them. The Court set aside Anwar Ali's conviction and ordered that he be tried according to law.[11]

Along with Anwar Ali Sarkar's case another case was being heard, that of Kathi Raning Ravat tried similarly by a special court in Saurashtra. Its hearing was adjourned to enable the Saurashtra State to explain the circumstances under which the Saurashtra State Public Safety Measures (Third Amendment) ordinance had been enacted. An Assistant Secretary filed an affidavit declaring that the ordinance had been passed in order to meet the very serious menace to public safety in the State taking the form of dacoity, robbery and murder. The preamble of the original Ordinance refers to the need to provide for public safety, maintenance of public order and preservation of peace and tranquillity in the State. The Ordinance under dispute allowed the State of Saurashtra to set up special courts under special judges for trying such cases or classes of cases, offences or classes of offences as the State Government may from time to time notify. The special court which tried the appellant had been set up to try certain *offences* specified in the notification. The Court held that the procedure laid down for trial in the special courts 'abridges the rights of the accused, and deprives them of certain benefits', 'even though it lacks some of the most objectionable features' of the procedure laid down under the West Bengal Act. But the question before the Court in this, as in Anwar Ali's case, was whether the law provided any basis for rational classification whereby certain

cases could be tried under a system less advantageous to the accused than the normal procedure. In the previous case the Court had held that 'the express provision of the enactment, if it is clear and unambiguous, cannot be curtailed or extended with the aid of the preamble to the Act.' It now held that 'the preamble to the Saurashtra Ordinance taken along with the surrounding circumstances and special features mentioned in the affidavit discloses a definite legislative policy and furnish a very cogent and reasonable basis of classification.' The Court therefore, upheld the conviction on the ground that 'section 11 of the Saurashtra Ordinance, in so far as it authorizes the State Government to direct offences or classes of offences or classes of cases to be tried by the Special court does not offend against the equal protection clauses of our Constitution and the notification cannot be held to be invalid.'[12]

The two cases can be clearly distinguished. Though the West Bengal Act and Saurashtra Ordinance both authorised the Government concerned to set up special courts for the trial of specified *cases*, the Saurashtra government did not choose to set up a court for the trial of such cases whereas the Bengal Government did. The Saurashtra court which had tried the appellant had been set up to try the accused for specified *offences*. This in itself might be held to furnish a reasonable basis for classification; persons accused of one group of offences to be tried by the special courts, the rest by ordinary courts. But a further question could be asked. On what basis were the offences selected for being placed in one group or another? The Court held that a basis was provided by the preamble which referred to 'the need to provide for public safety, maintenance of public order and preservation of peace and tranquillity in the State.' As Justice Mahajan declared in his dissenting judgment, 'this object may be considered to be a general one which has to be kept in view by every enlightened State.'[13] The majority of the Court however, held that 'In the light of the surrounding circumstances disclosed in the affidavit of the Assistant Secretary' the conditions in Saurashtra had become so bad that the legislative authority had to devise special measures to meet the situation. Preservation of public safety had become a special and heavy burden on the State

and the legislative authority could delegate to the government the right to select offences which the special courts were to try. The classification thus created could successfully meet the test the Supreme Court had laid down. It was based on a real and substantial distinction bearing a reasonable and just relation to the object sought to be achieved.[14]

The problem of distinguishing one case from another arose in its acutest form in Charanjit Lal v. the Union of India and Dwarka Das Shrinivas v. Sholapur Spinning and Weaving Co. The impugned Act was the same in both the cases, the Sholapur spinning and Weaving Company (Emergency Provisions) Act, 1950. In both the cases its validity was challenged on the ground that it infringed the fundamental rights guaranteed under article 31 (1) and 31 (2) of the Constitution. The Act had authorized the taking over of the control and direction of the Company from the directors elected by the shareholders and entrusted the management to directors nominated by the Government of Bombay, under direction from the Union Government. In Charanjit Lal's case, the Court held that the impugned Act did not infringe any fundamental right of the petitioner under article 31 as 'it did not deprive the company or the petitioner of any property save under authority of law.'[15] It declared that 'he was still in possession of his share, he had power to dispose of that share, he could receive a dividend on that share. Though he had lost some of the privileges annexed to his share, it could not be said that the State had taken possession of his share or was exercising the privileges which he enjoyed as a share holder.[16] It appoints directors of its choice in exercise of the power vested in it by the Act.'[17] The majority of the bench took the view that 'the petitioner had not discharged the onus that was on him of showing that in fact there had been any discrimination against him and other share-holders of the company under article 31.'[18]

It was conceded that a law 'may be constitutional even though it relates to a single individual, family or corporation.'[19] But the circumstances in Charanjit Lal's case 'were somewhat exceptional. The legislation related to a company which was engaged in the production of a commodity vitally essential to the community. In judging the reasonableness of the classification in such cases, the

Court has undoubtedly to look to the social, political or economic interests of the community.'[20]

In Dwaraka Das Shrinivasa's case the Court held that 'the impugned Act has infringed the fundamental right of the company guaranteed to it under article 31 (2) of the Constitution.' 'In substance, the Company and its shareholders as well as its directors and managing agents have been completely deprived of possession of the property and effects of the company and its possession has been taken by the Central Government. Practically all incidents of ownership have been taken over by the State and all that has been left with the company is mere paper ownership. It is immaterial to the person who is deprived of property as to what title the State acquires in it or what use the State makes of his property'.[21] 'The impugned Ordinance and the Statute following it are void as both of them encroach on the fundamental rights of the company under the Constitution'.[22]

The judgment of Justice Mahajan tried to distinguish this case from that of Charanjit Lal's.[23] It employed several of the usual methods used for concealing the fact that the Court was really reversing itself. The previous rule was sought to be limited to the case of the shareholders. It was said that 'the earlier case only determined the rights of the shareholders. The new appellants in the case were preference shareholders whose rights and privileges are somewhat different, even in winding up and in earning dividends, from the rights and privileges of the fully paid up shareholders.' It was further suggested that whereas the rights and privileges of the shareholders were in no way affected by the Act those of the preference shareholders were. 'They were in imminent danger of sustaining direct injury as they had been called upon to pay large amounts on call money on their partly paid preference shares'. In order to protect their interests, they are entitled to challenge the authority—the directors appointed by the central government—making the demand.

A feature distinguishing this case from the earlier one was allowed to arise during the proceedings in the Supreme Court. The old directors of the company made an application to the Court that they be allowed to support the appeal. This was accepted and

they became a party to the suit. There was also a substantial difference in the approach to the Court in the two cases. The first case was decided in writ proceedings where the onus of proving that his fundamental rights had been invaded lay on the petitioner. The second case came to the Court as an appeal from a decision of the High Court of Bombay. The petitioners had questioned the right of the directors appointed by the Government to make a call for payment of the unpaid portion of their preference shares. The trial judge dismissed the suit and his decision was affirmed by a bench of the High Court. The petitioners then came in appeal to the Supreme Court where the case was heard by the Constitution bench.

A layman may well ask, why should the Supreme Court give two contradictory opinions about the same law simply because different parties had questioned its constitutionality or had questioned it in different ways? The answer, however, is plain. In both cases the Court was mainly concerned with the question whether the parties that had approached it had had their interests seriously damaged by the impugned Act. In the first case the answer was in the negative and that really concluded the matter. The rest of the judgment in Charanjit Lal's case may be considered irrelevant and put aside. In the second case the appellants were being threatened with serious consequences and therefore were entitled to have the constitutionality of the impugned Act properly determined. This was done and the Act was declared void on scrutiny.

The Act was declared void because it violated the fundamental rights of the Sholapur Spinning and Weaving Mills Co. It is necessary to add that the property rights of all 'persons' are guaranteed under the Constitution. 'Person includes any company or association, or body of individuals whether incorporated or not' in Indian law.[24]

The interpretation of article 19 clauses 1 (d) and 5 came before the Court, among others, in three cases. The main question in them all was whether the restrictions placed on fundamental rights—curtailment of the right to move freely in the country or to form associations—had been placed in the interest of general public and were reasonable. In the three cases action was taken against

the 'persons' concerned by the Government's (Chief Commissioner, Delhi and Governor of Madras) or its officer's (Commissioner of Police, Bombay) being satisfied that such action was in the interest of the general public. The affected parties were given the right to make representation to advisory boards in Delhi and Madras and to the Commissioner of Police in Bombay. In Madras, the decision of the advisory board was to be final. It had the right of calling for additional evidence; the aggrieved party could be represented by an advocate. In Delhi, representation could be made only if the order of externment was extended beyond three months by the Chief Commissioner. The advisory board made recommendations to the government which was at liberty to disregard them.

In Dr. N. B. Khare v. State of Delhi, the East Punjab Public safety Act, 1949 was under attack.[25] Its provisions allowed the District Magistrate to extern a person, not resident in the area, from an area for three months with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. Even though it was not necessary to supply the grounds for externment—the Act said that these *may* be communicated—Dr. N. B. Khare was supplied the grounds on which the District Magistrate had acted. By a majority of three (Kania, C. J. and Fazl Ali and Patanjali Shastri) to two (Mahajan and Mukherjee) the Supreme Court held the Punjab Public Safety Act valid, interpreting the permissive provisions for supplying the grounds for the externment order as obligatory by holding 'may' in the Act to mean 'shall'. Thus the subjective satisfaction of the government regarding the necessity for the externment of a person coupled with a reference of the matter to an 'advisory board whose opinion, however, has no binding force' was considered by a majority to be a reasonable procedure for restricting the right of a non-resident to reside in an area. Mahajan and Mukherjee however held the externment order illegal as passed under an Act which they considered void. The impugned Act, they held, allowed the provincial government to extern a man for an indefinite period. They refused to rewrite the sub-section 6 of section 4 of the Act by substituting 'shall' for 'may'. As it stood, the Act made it entirely optional

for the authorities to communicate to the externees the grounds upon which the order had been issued against them.

On 31st March 1952 in the State of Madras v. V. G. Row, the Supreme Court unanimously held the Madras Criminal Law Amendment Act, 1951, void.[26] The impugned Act allowed the State Government to declare an association unlawful if the government had reasons to believe that its activities threatened public peace and order. It allowed the members of the condemned association or any one else interested in the matter to make a representation to the government against the order within a specified period. Such representations were to be considered along with the Government notification and the grounds thereof by a board. If the board was of opinion that there was not sufficient cause for outlawing the association, the government had to cancel the notification. A unanimous Court now held that 'restrictions on fundamental rights imposed after the subjective satisfaction of the government or its officers with an advisory board thrown into review the material on which the government seeks to override a basic freedom may be viewed as reasonable only in very exceptional circumstances' which it found wanting in the case. Such subjective satisfaction with an advisory board to *recommend* action rather than decide the question finally had been held reasonable in Dr. Khare's case. The Court therefore set out to distinguish this case from Dr. Khare's case. It considered that whereas the Punjab Public Safety Act was a temporary measure intended to cope with a state of near emergency, the Madras Act was a permanent measure. The Court conceded that 'an emergency requiring prompt steps to be taken to prevent apprehended danger to public tranquillity may necessitate that authority be vested in government and its officers to take appropriate action on their own responsibility'. But it held that 'what may be regarded as a reasonable restriction' under near emergency conditions would not necessarily be so if found in a permanent enactment. But probably the strongest feature that distinguished the Madras case from Dr. Khare's case was the fact that in the 'Madras Criminal Law Amendment Act, 1951, there was no provision for an adequate communication of the government's order to the interested parties'. The outlawed association may

not learn of the government's order till the government tried to freeze its funds or take possession of its property. If the government delayed taking such action till the specified period within which alone a representation against the order could be made, the aggrieved party may not learn of the order in time and lose all opportunities of representation. This would make the provisions for an almost judicial consideration of the government order a farce. What further distinguished this case from Dr. Khare's case were the heavy penalties which the Madras Law allowed to be imposed. All the funds of an outlawed organization could be freezed under the Madras statute and all its property confiscated.

In Gurbachan Singh v. State of Bombay and another,[27] the constitutionality of an externment order was again in question. A unanimous court held on May 7, 1952 that the City of Bombay Police Act, 1902 was made in the interest of general public and to protect them against dangerous and bad characters whose presence in a particular locality may jeopardise the peace and safety of the citizens. 'Having regard to the class of cases to which the law applies and menace which an externment order is intended to avert', the Court held the restrictions imposed reasonable. Before an order was passed the externee was permitted to appear through an advocate, file a written statement and produce witnesses for clearing his character. The Court held this procedure also reasonable. Here, unlike in Dr. Khare's case, the constitutionality of a permanent measure was involved. The Court had struck down the Madras Criminal Law Amendment Act for, among other reasons, its placing a permanent restriction on fundamental rights. It now upheld the constitutionality of the Bombay Police Act probably because—even though it was a permanent measure—it not only made provisions for communicating the order to the externee but gave him an opportunity of rebutting the grounds of the order. This distinguished it from the case of V. G. Row. The Bombay Police Act further differed from the Madras Criminal Law Amendment Act, 1951, in that it authorized no seizing of property and no freezing of funds.

In the Commissioner of Income-Tax, Madras v. Mtt. Ar. S. Ar. Arunachalam Chettiar,[28] the assessee had filed an appeal

under Section 30 (1) of the Income-Tax Act against an order of the Income-Tax Officer. The Appellate Assistant Commissioner dismissed it on November 19, 1945 as incompetent. The assessee did not file any appeal against this order. On a suggestion made in the order of the Appellate Assistant Commissioner, the assessee filed an original miscellaneous application before the appellate tribunal for relief. The tribunal on February 20, 1956 set aside the findings of the Income-Tax Officer and directed him to make a fresh assessment. On the application of the Commissioner of Income-tax, Madras, the tribunal referred to the High Court the question whether this order of 20th Feb. 1946 was an appropriate order and was legally valid and binding on the Income-Tax Officer. The High Court declined to answer this reference on the ground that the order of the tribunal was not one passed in an appeal under Section 33 (1) and that in consequence the reference under Section 66 (1) was itself incompetent.

The Supreme Court in appeal held that as there was no proper appeal before the Appellate Assistant Commissioner such as is contemplated by section 30 (1), the order made by the Appellate Assistant Commissioner cannot be regarded as an order made by him under section 31 (3). An order under section 31 (3) can only be made in disposing of an appeal properly filed under section 30.

In Messrs Mela Ram and Sons v. The Commissioner of Income-Tax,[29] Punjab the Supreme Court held that the orders of Appellate Assistant Commissioner holding the reasons for excusing the delay in presenting the application to him insufficient and rejecting the application as time-barred, were passed under section 3(1) and would be open to appeal. Naturally the contradiction between the two decisions had to be explained. Justice Venkatarama Ayyar declared that there was nothing in the decision itself (of the previous case) which bears on the point under discussion. 'But certain observations occurring at pages 474 and 475 were referred to by the learned judges as leading to the conclusion that an order dismissing an appeal as barred by time would fall under Section (30) (2). Read in the context of the point that actually arose for decision those observations lent no support to the conclusion reached by the learned judges'. Justice Ayyar confined the law declared in the

previous case to the decisions therein and declared that the observations of the Court cannot be read as a decision that an order dismissing an appeal as barred by limitation is one under Section 30 (2). To clinch the issue he further asserted that there is abundant authority for the position that section 31 should be liberally construed so as to include not only orders passed on consideration of the merits of the assessment but also orders which dispose of the appeal on preliminary issues such as limitation and the like.

In Rao Shiv Bahadur Singh and another v. The State of Vindhya Pradesh,[80] the Supreme Court censured Shanti Lal Ahuja, the Additional District Magistrate, Delhi for his part in laying a trap for catching Shiv Bahadur Singh while receiving a bribe. 'Even though he was a member of the judiciary he lent his services to the police authorities and became a limb of the Police as it were'. The Court endorsed the observations of Justice Mukherjee of Calcutta High Court that, 'to make the Magistrate a party or a limb of the police during the police investigation seriously undermines the independence of magistrates and perverts their judicial outlook. This practice is all the more indefensible here specially when there is no separation of executive from the judiciary. The basic merit of the administration of natural justice in the state lies in the fact that the person arrested by the police is entitled to come before an independent and impartial magistrate who is expected to deal with the case, without the magistrate himself being in any way a partizan or a witness to police activities. The magistrates are put in the unenviable and embarassing position of having to give evidence as a witness and then being disbelieved'.

In Ram Kishan and another v. the State of Delhi[81] a trap had been laid for catching the appellant. The trap succeeded, Rs. 5,000 was paid by Ram Kishan while two police officers and a magistrate were hearing the conversation from an adjoining room through a hole in the door. The counsel for the appellant urged in the case that as a trap was laid, this circumstance should be taken into account in the matter of sentence. Justice Chandrashekhar Ayyar conceded that severe condemnation is merited where the police authorities themselves supply the money to be given as a bribe, but he added, 'it cannot be laid down as an absolute rule that the lay-

ing of traps must be prohibited on the ground that by so doing we hold out an invitation for the commission of offences' and declared that 'whatever the ethics of the question might be, there is no warrant for the view that the offences committed in the course of traps are less grave and call only for lenient or nominal sentences'.

In the State of Bihar v. Basavan Singh the Supreme Court had to consider once again the practice of laying traps by police officers in order to catch criminals. The Patna High Court had on 13th January 1955 held the evidence of the police officers and the magistrate—who had laid a trap for the respondent sub-inspector of police for catching him while accepting a bribe—inadmissible as evidence of fact and acquitted Basavan Singh. Justice S. K. Das in rebuttal quoted from a *fuller* report of the Supreme Court decision in the earlier case rather than from the authorised printed report. 'A perusal of the evidence leaves in the mind the impression that they (members of the raiding party) were not the witnesses whose evidence could be taken at its face value.' On behalf of a unanimous Court Justice S. K. Das now declared that it was wrong to deduce from this decision 'any universal or inflexible rule that the evidence of the witnesses of the raiding party must be discarded unless independent corroboration is available.' Justice S. K. Das distinguished the present case from the earlier one by pointing out that in Shiv Bahadur Singh's case the police had provided money for the commission of the crime which it had not evidently done in the instant case. The decision of the High Court was over-ruled and the acquittal of the respondent set aside. The moral indignation shown in the earlier case was now toned down to the hope—following justice Goddard in Brennan v. Peck—that 'the day is far distant when it will become a common practice for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone else.' [32]

In Topandas v. the State of Bombay,[33] Topandas and three others were charged with having been parties to a criminal conspiracy by agreeing to do certain illegal acts. The Presidency Magistrate, Bombay tried all the accused for the said offences and acquitted all of them. In appeal, the High Court of Bombay reversed the acquittal of Topandas and held him guilty of all the

offences with which he was charged including an offence under Section 120 (b) I. P. C. The High Court seemed to imply that Topandas had other unknown co-conspirators.

The Supreme Court granted special leave to Topandas on the question of law whether the conviction under section 120 (b) is maintainable in view of the fact that the other alleged conspirators had been acquitted. The Supreme Court held that 'the position in law is clear. On the charge as it was framed against the accused Nos. 1 to 4 in this case, when his alleged co-conspirators the accused no 2, 3 and 4, had been acquitted of the offence, accused no. 1 could not be convicted of the offence under Section 120 (b) I.P.C.'

In Bimbadhar Pradhan v. the State of Orissa,[84] Bimbadhar Pradhan and four others, were tried for criminal conspiracy under section 120 (b). The trial judge convicted the appellant though he acquitted his four subordinates. He held that the accused got the assistance of Pitabas Sahu, the approver in the case. The High Court on appeal upheld the conviction. He came to the Supreme Court with special leave to appeal. Here, the decision in the case of Topandas v. the State of Bombay was relied upon to argue that the other accused having been acquitted of conspiracy the appellant alone could not be convicted. Justice Sinha distinguished the present case from the previous one 'in as much as in that case the only persons alleged to have been guilty of conspiracy were the persons placed on trial. In the instant case besides the person placed on trial there was the approver who was implicated in the conspiracy. The fact that he became an approver did not destroy the earlier fact that he had been a member of the criminal conspiracy.' Justice Sinha went on to say that 'it cannot be said that this case is on all fours with the previous decision of the Supreme Court.' It was argued that the charge against the accused mentioned conspiracy between him and the other accused persons. This did not include the approver. The Court, however, declared that this omission in the charge was a mere irregularity which has neither misled the appellant nor occasioned failure of justice. It further added that it is not essential that more than one person should be convicted of the offence of criminal conspiracy. It is enough if the

court is in a position to find that two or more persons were actually concerned in criminal conspiracy.

The C. P. and Berar Motor Vehicles Act, 1947, permits the State Government to take over the entire transport business. The State Government issued a notification declaring the intention of the State to take over certain bus routes on 4th February 1955.[34] This was after the passage of First Amendment to the Constitution Act, 1951, which saved from the vires of unconstitutionality any existing law in so far as it related to 'the carrying on by the State of any trade, business, industry or service to the exclusion, complete or partial, of citizens or otherwise.' [36]

In Saghir Ahmad's case the Supreme Court had held that a similar U. P. Act (U. P. State Road Transport Act) violated the fundamental rights guaranteed under article 19 (1) (g). Even though the First Amendment to the Constitution Act had been passed when the Supreme Court decided the question, the Supreme Court had held in Saghir Ahmad's case that when the Constitution came into effect on 26th January 1950, U. P. Road Transport Act became void. 'A Statute void for constitutionality is dead and cannot be vitalised by a subsequent amendment of the constitution removing the constitutional objection.'[35]

In Bhikaji Narain Dhakras and others v. the State of M. P.[37] the Supreme Court declared that article 13 (1) had the effect of nullifying or rendering the existing law which had become inconsistent with Article 19 (1) (g) read with clause (6) as it then stood, ineffectual, nugatory and devoid of any legal force or binding effect only with respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution. Therefore, between the 26th January 1950 and 18th June 1951, the impugned Act could not stand in the way of the exercise of the fundamental right of a citizen under article 19 (1) (g). The true position is that the impugned law became, as it were, eclipsed, for the time being by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951, was to remove the shadow and to make the impugned Act free from all blemish or infirmity.'

'All laws, existing or future, which are inconsistent with the

provision of part III of our Constitution are, by the express provision of article 13, rendered void to the extent of such inconsistency. Such laws were not dead for all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remained in a dormant or moribund condition. In our judgment, after the amendment of clause (6) of article 19 on the 18th June 1951, the impugned Act ceased to be unconstitutional and became revivified and enforceable against citizens as well as against non-citizens. It is true that as the amended clause (6) was not made retrospective, the impugned Act could have no operation as against citizens, between the 26th January 1950 and the 18th June 1951 and no rights and obligations could be founded on the provisions of the impugned Act during the said period, whereas the amended clause (2) (which relates to the savings in regard to freedom of expression) by reason of its being expressly made retrospective had effect even during that period. But after the amendment of clause (6) the impugned Act immediately became fully operative even against the citizens. The notification declaring the intention of the State to take over the bus routes to the exclusion of all other motor transport operators was published on the 4th February 1955 when it was perfectly constitutional for the state to do so. In our judgment the contentions put forward by the respondent as to the effect of the Constitution (First Amendment) Act 1951 are well-founded and the objections urged against them by the petitioners are untenable and must be negatived.'

The Court said that the specific question of the effect of amended clause (6) of article 19 on laws passed before the passage of the First Amendment to the Constitution Act, 1951, had not been formally raised nor considered in Saghir Ahmad's case.

The C. P. and Berar Motor Vehicles Act was also challenged as being inconsistent with article 31 of the constitution on the analogy of the decision of the Supreme Court in Saghir Ahmed v. State of U.P. Here again relying on the Fourth Amendment to the Constitution Act, the Supreme Court held that the law had been unconstitutional under this article till the Fourth Amendment Act

was passed. With the passage of that amendment the inconsistency between the impugned act and the article 31 had been removed. 'The petitioners could not challenge, in an application filed after the Fourth Amendment Act become operative, the constitutionality of the Act on that account.'

The study of these cases illustrates the way in which the Supreme Court has been refraining from perpetuating its mistakes. Very often an earlier opinion has been abandoned because a dissenting judge has been able to convert his colleagues on the bench to his way of thinking. The reversal of its earlier decisions has usually occurred in cases where the Court was originally divided in its opinion. It is interesting to note that usually there is no unanimity in the new opinions either. Of course, here and there, a judge may change his opinion, but many of the reversals are largely due to changes in the composition of the Court. Thus the Industrial Disputes (Bank) Tribunal which originally consisted of three members was held to be without jurisdiction when the third member of the Tribunal was absent on duty elsewhere by Justice Mahajan, Mukherjee, Das and Bose.[38] Of these only Justice Mukherjee had held otherwise in the first instance. In the cases concerning special courts, Justice Patanjali Sastri held all of them invalid. Justice Das held the West Bengal Public Safety Act invalid so far as it allowed individual cases to be sent to special courts.[39] As the Saurashtra Court was created by a notification under the Saurashtra Public Safety Measures Ordinance referring the trial of specified *offences* to the Special Courts, Justice Das held the Courts so created valid,[40] Justice Chandrasekhar Aiyyar held the West Bengal Act, the Saurashtra Ordinance and Bombay Public Safety Measures Act void. He held the trial of Qasim Razvi under Hyderabad Regulation a proper trial as it was not proved that he had been adversely affected by being tried by a special court.[41] Justice Fazl Ali upheld the Saurashtra Ordinance while condemning the Bengal Act.[42] Justice Mukherjee upheld the Hyderabad Regulation and the Saurashtra Ordinance while holding Bombay and Bengal Acts void.[43] The Sholapur Spinning and Weaving Mill Ordinance and Act were held void unanimously in the second case.[44]

NOTES

1 Article 141 of the Constitution of India.

2 'The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains .... on the rarest instances, if ever, would conduct have been different if the rule had been known and the change foreseen'. Cardozo, *Growth of ihe Law*, 122.

3 Gurbachan Singh V. State of Punjab. A.I.R. 1956. S.C. 460.

4 1955 I S.C.R. 563.

5 Ibid. 565.

6 1952 S.C.R. 710.

7 1953 S.C.R. 589.

8 1950 S.C.R. 502.

9 1951 S.C.R. 403.

10 Ibid.

11 1952 S.C.R. 284.

12 1952 S.C.R. 435.

13 Ibid., 453.

14 Ibid., 439.

15 1950 S.C.R. 869.

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

21 1954 S.C.R. 674.

22 Ibid., 715.

23 Ibid., 707.

24 Ibid.

25 1950 S.C.R. 519.

26 1952 S.C.R. 597.

27 1952 S.C.R. 737.

28 1953 S C.R. 474.

29 1956 S.C.R. 166.

30 1954 S.C.R. 1114.

31 1956 S.C.R. 190.

32 A.I.R. 1958 S.C. 500.

33 1955 II S.C.R. 886-887.

34 1956 S.C.R. 217.

35 Cf. Bhikaji Narain Dhakras and others v. State of Madhya Pradesh, 1955, II S.C.R. 589.

36 Saghir Ahmed v. State of Uttar Pradesh, 1955, I S.C.R. 707.

37 Bhikaji Narain Dhakras and others v. State of Madhya Pradesh and Another 1955, II S.C.R. 589.

38 The United Commercial Bank Ltd. v. Their Workmen A.I.R. 1951, S.C. 380.

39 Justice Das in State of West Bengal v. Anwar Ali Sarkar, 1952, S.C.R. 284.

40 Justice Das in Kathi Raning Rawat v. State of Saurashtra 1952, S.C.R. 435.

41 Justice Chandrasekhar Aiyar in State of West Bengal v. Anwar Ali Sarkar 1952 S.C.R. 284 and in Kathi Raning Rawat v. State of Saurashtra, in Lachhamandas Kewalaram Ahuja v. State of Bombay, 1952 S.C.R. 710. Justice Chandrasekhar Aiyar in Syed Kasim Razvi v. State of Hyderabad, 1953 S.C.R. 589.

42 Justice Fazl Ali in Kathi Raning Rawat v. State of Saurashtra, 1952, S.C.R. 435, and in State of West Bengal v. Anwar Ali Sarkar, 1952, S.C.R. 284.

43 Justice Mukherjea in Syed Quasim Ravi v. State of Hyderabad, 1953, S.C.R. 589; in Kathi Raning Rawat v. State of Saurashtra, 1952, S.C.R. 435, in Lachhmandas Kewalram Ahuja v. State of Bombay 1952 S.C.R. 710; in State of West Bengal v. Anwar Ali Sarkar, 1952, S.C.R. 284.

44 Dwarkadas Srinivas v. Sholapur Spinning and Weaving Co., 1954 S.C.R. 674.

CHAPTER XIII

WHEN THE SUPREME COURT REVERSES ITSELF

The duty of the judiciary is to interpret the law. In States with Anglo-Saxon traditions (U.K., Commonwealth countries and U.S.A.) a court does not set out interpreting the law on its own in a vacuum. The cases brought to the Courts may turn on facts, on law, or on both. The courts apply the law to the case in hand and in doing so interpret it. A case may go from one court to another. Different courts may interpret the law differently. The interpretation of a particular law given by the highest court in a country (or outside the country as by the English Privy Council) becomes binding on the lower courts.

It stands to reason that the interpretation of law by the highest court should be respected.[1] But the interpretation is the work of the application of human minds to a given situation. 'History, social needs, the personality of a judge, philosophical attitudes, logic, linguistics all of these may be forces in the formation of a particular decision in the public law'. The interpretation may not always be unanimous.[2] Some Judges may be inclined to interpret the same law in one way, others in another way. The court may sometimes be almost evenly divided. Majority decisions are not unknown. The Judges constituting the majority may sometimes exceed those making up the minority by one.[3] The decision of the court may sometimes be the result of several judges coming to the same conclusion but for widely different reasons thus creating a majority by 'conflicting minorities in combination.'[4]

The highest courts consist of judges who may be appointed for life or hold office till they reach a certain age. The composition of the court may, therefore, change from time to time. With the changes in its composition, the opinion of the court may also undergo a change.

The interpretation of the law by the highest court is binding on all courts. In some countries, this is a matter of convention. In India, this has been laid down in the Constitution itself. In

England, the House of Lords, the highest court in the country, feels itself bound by its previous decisions. The Privy Council as the court of appeal for the dominions and the colonies does not consider itself formally bound by its previous decisions. But as Justice Venkatarama Iyer said in a dissenting judgment, it has never reversed itself except in ecclesiastical cases.[5] Moreover it has considered itself bound by decisions of the House of Lords in non-constitutional cases.[6] In some other countries the highest court has considered itself to be at liberty to change its own previous interpretation of the law. 'Since 1935 many earlier decisions have been discarded or refined away'[7] in the United States. The High Court in Australia 'holds itself bound by decisions of the Privy Council and of the House of Lords. As a rule it will follow decisions of the (English) Court of Appeal'. It does not however, hold itself bound by its own decisions. In some published cases, though one or more Judges have held that a previous decision was wrong, they have, however, refused to reverse the decision simply because to them one interpretation appeared to be better than another. They seem to have held that it is better that law is certain than absolutely correct.[9] In the Engineers case[10] however, they 'set aside a principle which had been affirmed by the Court a few months previously and found in the Constitution a grant of power to the Commonwealth which had been submitted to the people and rejected by them.' In the United States, the Supreme Court has changed its interpretation of the Constitution with changes in the prevailing philosophy of the Constitution. Between 1793 and 1957, lie almost 200 years pregnant with changes in the organisation of society. It may not be true that the Supreme Court in the U.S.A. always follows the election returns at a distance. It would, however, have to be conceded that its attempt to face constantly varying aspects of the American economy and public opinion, the Supreme Court has usually accepted the emerging trends after some hesitation. The changes in its philosophy of the Constitution have usually been affected by the prevalent political philosophy. It may have been pro-States and anti-federal government at one time; it may seem to be favouring Federal Government at another time. It may have been leaning toward protecting private rights rather

too much as against public interest; it may veer around to approve every extension of federal power. It is seldom, however, that it has changed its interpretation of the law on merely legalistic considerations. 'The general effect of the numerous reversals of precedent between 1937 and 1950 was to bring judicial interpretation more generally into accord with the formal text of the constitution and dispose of a considerable amount of constitutional chaff'. It has been claimed that in the United States 'the Supreme Court has never hesitated to overrule constitutional decisions that did not seem to fit the requirement of the new age', when a 'conscious departure from a known rule and deliberate adoption of a new one, in obedience to the promptings of a social need so obvious and so insistent as to overrun the ancient channel', required the change. But the overruling does not affect an abrupt change in the law; it rather recognises a *fait accompli*.[11]

One may, however, recall what happened in the United States in 1870. 'In Hapburn v. Griswold the Court by 5 to 3 held the wartime legal tender invalid. As soon as Strong and Bradly came to the bench, they joined with the three dissenters to order that the constitutional question be reargued in some other legal tender case awaiting decision.' In the upshot Hapburn v. Griswold was overruled and the Act sustained by 5 to 4.[13] Professor Fairman holds that 'admittedly the episode did great harm to the prestige of the Court'.[14] It has been said that the Court of Appeals in U.K. feels itself free to reverse its earlier decisions. But it is not the highest court in U.K. There is the House of Lords that entertains appeals against its decisions. If the House of Lords upsets its interpretation of law, the Court has to follow the House of Lords and is thus bound to reverse itself. That it may reverse itself in other cases as well is beside the point. It has been said that in the eighteenth century and earlier years of the nineteenth century the rule of *stare decisis* was held subject to specific qualifications in England. Judges exercised considerable freedom and could do justice to the social and economic changes. Later on the rule became absolute, probably because the tempo of the changes decreased. Once again since 1944 qualifications have come to be introduced. 'The modern qualifications of the rule assume two forms: a considerable

liberty to the Court of Appeals to disregard its own decisions . . . . .'[15] 'Mere certainty', it is now claimed, 'should not *always* prevail against ethical values, social utility and suitability to the conditions to which the law is designed to apply.'

Judges and lawyers have some very interesting methods of changing their interpretation of the law while holding that they are not doing so. There is that interesting practice of distinguishing the present case from the previous one which seems to provide so much work to the legal profession as well as to the Judges. 'A law may be differently interpreted in one case from how it was interpreted in another by making nice distinction in the facts or one analogy may be better than another, or a void may exist which allows a judge to legislate interstitially particularly when the phrase to be interpreted is as broad as inter-State Commerce'[16] in the constitution of the United States. We are not concerned here with this constant process of amending the law by the Judiciary. We are considering only frank and forth-right reversal by the highest court in the country of a decision which it may have given earlier. Outside India, highest courts have seldom, if ever, changed their interpretation of law except as a result of a change in the prevailing political philosophy.

The Government of India Act, 1935 gave the provinces the right to levy Sales and Purchases Tax. The Government of India tried to prevent the levy of the tax by insisting that the way in which it was levied in some provinces, it was an excise duty rather than a tax on sale or purchase. The Federal Court however decided that the provincial government could levy sale or purchase tax on the first sales or purchases in their provinces. This made it possible for the same article to be taxed more than once. Sales tax laws of the various provinces sometimes authorised levying of the tax on all sales or purchases in the provinces.[17] The Constitution of India tried to make multiple taxation of the same transaction impossible. The various States now amended their laws accordingly or passed new Acts levying the Sales Tax. The Bombay Sales Tax Act of 1952, for example, allowed the State to tax all sales and purchases. The rules made thereunder, however, excepted out-of-State purchases when goods were delivered by railway and a shipping or aircraft

company or country-boat registered for carrying cargo or public motor transport service, or by registered post. The Act also taxed out-of-State sales of goods for delivery in the State of Bombay for consumption therein. The United Motors Ltd. and others presented a petition to the High Court of Bombay on November 3, 1952 challenging the validity of the Act as it was alleged to offend against article 286 of the Constitution. The High Court held the Act invalid but the State of Bombay appealed to the Supreme Court. When the case came to be heard in the Supreme Court, it issued notice of the appeal to Advocates-General of all States and to the Attorney-General of India. The Attorney-General and most of the Advocates-General of the States appeared before the Supreme Court which thus 'had the assistance of a full argument dealing with all aspects of the case'. The Court held by a majority of four to one that the State in which goods were delivered for consumption had the right of taxing the out-of-State seller who sold goods for such delivery. One of the Judges held that the seller could also be taxed in the State where he had his business office. One Judge alone held that no State had a right to tax goods sold or purchased in the course of inter-State trade or commerce. The judgment of the Supreme Court was delivered in this case on March 30, 1953.[18]

Another case raising the same question had come to the Supreme Court from Travancore-Cochin. In this case again, by a majority of four to one, the interpretation of article 286 as given in the Bombay case was upheld. One Judge who was not a member of the bench which had heard the Bombay case, however, questioned the judgment of the Supreme Court in that case. This judgment was delivered on May 8, 1953.[19]

In Himatlal Harilal Mehta v. State of Madhya Pradesh[20] article 286 once again received the attention of the Supreme Court. In a unanimous decision of the Court, the majority decision of the Supreme Court in the Bombay case was referred to with approval.

Several States had been levying Sales Tax on out-of-State dealers who sold goods for delivery and consumption therein. The Sales Tax did not represent any additional burden on the out-of-State sellers. They could pass it on to the consumers in the State

where their goods were consumed. The sellers became 'collectors of the tax' on behalf of the State. One of the States taxing out-of-State dealers for goods delivered in the State for consumption therein was Bihar. Under the Bihar Sales Tax Act 1947, it asked the Bengal Immunity Co. of Calcutta to get itself registered under the Act and to submit a return of its turnover in Bihar for the year 1950-51. The Company ultimately appealed to the Supreme Court. On September 3, 1955 the Supreme Court reversed its earlier interpretation of the law and held that a State was not empowered to tax out-of-State dealers for goods delivered in the State for consumption therein.[21]

The State of Bombay v. The United Motors had been decided by a Court consisting of Patanjali Sastri C. J. and Justices Bose, Mukherji, Ghulam Hasan and Bhagwati. Of the five one alone had dissented from the judgment of the Court. The Bengal Immunity case was heard by a Court consisting of seven Judges. Of these Bose and Bhagwati J. J. had participated in the previous decisions. S. R. Das, acting C. J. had been a member of another bench which had considered a similar case, State of Travancore-Cochin v. S. V. Cashew Nut Factory. Justices Jagannadhadas, Sinha, Jafar Imam and Venkatarama Iyer were sitting to consider the question for the first time. As against the five judges who had heard a similar case in 1953, the Court in 1955 included the entire Supreme Court excepting the Chief Justice who was ill.

The present Court was thus largely a new one. Of the three Judges who had heard a similar plea earlier, Bose had dissented from the majority judgment of 1953 in the Bombay case. Bhagwati had in 1953 conceded the right of taxing a sale both to the State of origin and the State of delivery. Justice S. R. Das in the Travancore-Cochin case wrote a dissenting judgment but accepted as binding the majority decision in the Bombay appeal 'so long as it stands'.[22] Of the four new Judges, three saw no reason to upset the previous judgment of the Supreme Court whereas only one held that an inter State sale could not be taxed by the State in which the articles were delivered for consumption. S.R. Das C. J. (acting) and Justice Bose stuck to the dissenting opinion which they had given in the earlier cases and held that the State of delivery was

not entitled to tax outside sellers. Justice Bhagwati now changed his previous view of the law and concurred in the interpretation of article 286 given earlier in the dissenting judgment of Justices Bose and S. R. Das. If Justice Bhagwati had not changed his mind the Court would not have reversed itself. As it is, it was a reversal of a previous decision by a bare majority of four Judges against three. If the permanent Chief Justice had continued to be a member of the bench, the Court might have found itself divided equally, four against four; even then the previous decision would not have been reversed. The upshot well illustrated the remarks of Justice Frankfurter in dissent that under some circumstances the law may become 'the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors'.[23]

Though Judges and Courts are entitled to change their opinions the case under discussion reveals certain disquieting features. The majority not only reversed a previous decision of the Court, it ordered that 'the State of Bihar must pay the cost throughout'[24] presumably because it had followed a previous interpretation of the Constitution by the Supreme Court! It was penalized because it failed to foresee that the Court in 1955 would reverse a decision given in 1953.

The majority judgment blandly adds that 'the minds of the Judges' had been evidentially *oppressed* by the harrowing picture of the economic collapse of the States'[25] which would follow if they were not allowed to tax such transactions. This is a serious charge by four Judges of the Supreme Court against six of their colleagues, past and present. If an outsider were to make a similar observation on a judgment of the Supreme Court, it would certainly hold the offender guilty of contempt of court as it did the Times of India in an earlier case.[26]

The majority in the Bengal Immunity case further held that 'there appears to be some vagueness, if not inconsistency in the (Bombay) judgment itself'. The inconsistency which the majority judgment now discovered in the earlier judgment is the result of reading a passage 'by itself', a practice which the Supreme Court has very often condemned in others. The Bombay judgment had

been considered earlier by a constitutional Bench of the Supreme Court in the case of Himatlal Mehta v. The State of Madhya Pradesh. The unanimous judgment of the Court was delivered by Justice Mahajan, on March 16, 1954. The Court consisted of the Justices Mahajan, Mukherjee, S.R. Das, Vivian Bose and Ghulam Hasan. Therein it was said that in the State of Bombay v. The United Motors Ltd., 'it had been held that article 286(1)(a) of the Constitution read with explanation thereto and construed in the light of article 300 and article 304, prohibits the taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein'.[27] Neither Justice Bose nor Justice S.R. Das had discovered any inconsistency or vagueness in the Bombay judgment in March 1954.

Another reason for reconsidering the earlier decision advanced by the majority is that one of the members of the earlier majority had, 'on further reflection' changed his mind.[28] The fact of a judge's changing his mind could not have been known to the Court before it set about hearing arguments on whether or not to permit a reconsideration of its earlier decision.

Though the two earlier decisions were given by a Court with one dissenting judgment in each case, it is surprising to find the Court now declaring that in the earlier decision the judicial opinion 'was divided, if not evenly balanced.'[29] This is a queer way of describing a judgment given by a majority of four to one. A unanimous Court might have tried to belittle an earlier decision in this way, but it comes ill from a majority of the Court representing four Judges against three.

The majority judgment in the Bengal Immunity Case advances yet another reason for its reversing the earlier judgment. 'It is by no means easy to amend the Constitution of the Union of India or of the United States of America.' However true this may be in the U. S. A., the Union Constitution has been amended seven times since its coming into force a little more than seven years ago and amending it is very much easier than amending the Constitution of the United States.[30]

One of the majority Judges in the Bengal Immunity case seemed

to be in two minds as to what the decision of the Court in 1953 was. Justice Bhagwati in one place holds that 'the majority judgment in the Bombay Sales Tax Appeal did not say that the delivery State was entitled to tax the sellers'.[81] Earlier in the same judgment, however, he concedes that 'the delivery-State is left by the earlier decision free to tax such sales as fall within the terms of the explanation. The explanation saves such transactions from the ban imposed by article 286 (2). The majority judgment held that article 286 (a) of the Constitution read with the explanation thereto and construed in the light of articles 301 and 304 prohibits the taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein. The latter State is left free to tax such sales or purchases'[82]. It is difficult to understand why Justice Bhagwati runs away from his own earlier interpretation of the majority judgment. His earlier reading of that judgment is clear. 'The delivery State is left free to tax such sales or purchases'. In view of this it is amazing to find him saying as he does, that 'the question whether the seller or the purchaser would be subject to a levy of a tax was not before the Court'.[83] One may expect fine points of law raised in a judgment of the Supreme Court but to find two contradictory descriptions of an earlier judgment to which the judge himself was a party is rather disconcerting.

It is surprising that though all the decisions in these cases turned on the interpretation of the Explanation in Clause 286 (1) (a), the majority judgment in Bengal Immunity Co. case proclaims that 'it is not necessary for us to express any final opinion in the matter' (true meaning and effect of the Explanation[84]). They repeat elsewhere, 'We do not desire on this occasion to express any opinion on the validity claimed for or the infirmities imputed to any of these several views of the Explanation'.[85] But after disclaiming any desire to express a final opinion in the matter, they proceed to adopt, what they themselves describe as 'the strict view of the explanation' taken in the dissenting judgment of Justice S. R. Das in the Travancore-Cochin Sales Tax cases and Justice Bose in his dissenting opinion in the Bombay Sales Tax case.[86] It is not

surprising that Justices Das and Bose should show a preference for their own view of the matter; but the majority need not have tried to conceal their preference by declaring that they were not deciding the question. This part of the majority judgment becomes all the more open to objection because almost the entire judgment turns on the interpretation of the Explanation which the majority judges have adopted even though they sometimes make it depend on their interpretation of article 286 (2).

It seems difficult to escape the conclusion that in this case the Supreme Court did not squarely face the question which a justice who concludes that a precedent is founded on an error is confronted with in the United States. Did they ask themselves 'how much harm will be done by letting it stand? Would the good to be attained by overruling more than compensate for the confusion that would be produced? Is this a matter that could safely be left to constitutional amendment?' Nor do they seem to have asked themselves whether 'the earlier interpretation needed to be superseded in order to do justice according to law.' The majority seems to have reversed the previous decision simply on the grounds that 'another view is possible'. This is to take a very light view of the place of the Supreme Court in the Constitution. 'Definiteness and certainty' are essential conditions for the growth of the rule of law. If the Supreme Court were to review its previous decisions on the ground that another view is possible, the litigant public may be encouraged to think that it is always worthwhile taking a chance of taking a case to the highest court in the land. As one of the dissenting judges put it, 'the prospect will have been opened of litigants subjecting our decisions to a continuous process of attack before successive benches in the hope that with the changes in the personnel of the Court which time must inevitably bring, a different view may find acceptance'. 'This should prove greatly damaging to the prestige of the court'[37]. As a dissenting judge of the Supreme Court in the United States in a case of reversal asserted, 'counsels and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to

settle for they will have no assurance that a declared rule will be followed. Respect for the tribunal must fall when the bar and public come to understand that nothing that has been said in prior adjudications has force in current controversy'[38].

Decisions of the Supreme Court are binding on all other courts. Of the two litigants similarly situated, one may and another may not go to the Supreme Court. The litigant banking on the chance of the Supreme Court changing its opinion, may have a favourable decision, whereas the one who did not come upto the Supreme Court may have to remain content with an earlier version of the collective wisdom of the Court. As the majority judgment concedes frivolous attempts may be made sometimes to question a previous decision.[39] It is begging the question to say that if the reasons on which the decisions of the Court are founded are sound, they will themselves be sufficient safeguard against such frivolous attempts.[40] The decisions in the Bombay Sales Tax case had appeared to be sound to a majority of the judges in the Travancore-Cochin Sales Tax case and to all the judges in the Madhya-Pradesh Sales-Tax cases in 1954. In the latter case, it had been accepted by Justices S. R. Das and Vivian Bose who now question it. The Supreme Court has often warned the inferior courts as well as lawyers against the practice of bringing cases to the Court on points that had already been decided by attempting frivolously to distinguish the new cases from the old. Under the present circumstances all but the unanimous decision of the Supreme Court would be liable to be reopened for its consideration again almost immediately. Even a unanimous decision may be reopened before a partially reconstituted Court.[41] The Constitution would then certainly become the plaything of the lawyers that some have described it to be.

When the Bengal Immunity Co. case was heard by the Supreme Court, the bench consisted of seven judges rather than five which normally make up a constitution bench. In fact, it included all the judges except the Chief Justice who was ill and on leave. The decision was given by an almost evenly balanced Court. It is permissible to argue that a normal bench of five judges could have either maintained the previous interpretation of the law or at least

refused to reverse it. Had the Chief Justice been not ill, it is likely that the Supreme Court may not have reversed its previous decision. He was a member of the majority which had pronounced the earlier decision. He may have been able to pursuade one more member to his own point of view.

It is necessary to remember that during the hearing of the Bengal Immunity case, no new arguments were advanced which had not been considered and disposed of earlier. The fact that one of the judges who had held in the Bombay (United Motors Ltd.) case that both the State of delivery and the State where the first sale took place could levy sales tax on the same transaction, held now that neither of these could do so, cannot be explained with reference to any new arguments which the Judge had not heard in the first case and which were addressed to the Court now.

In the Bengal Immunity Co. case much seems to have been said about the fundamental rights.[42] As a matter of fact, no fundamental rights of Indian citizen were involved in this case. The appellant was a corporation. The Supreme Court has not yet decided that a corporation is a citizen and as such enjoys fundamental rights guaranteed to citizens in the Indian Constitution.[43]

There is a constant harping in the majority judgment in the Bengal Immunity Co. case on the hardship to which a corporation would stand to be subjected if the right of the delivery State to levy sales tax on out-of-State seller, was accepted. "All big traders will have to get themselves registered in a State, study the Sales Tax Act of each State, and conform to the requirements of all States laws which are by no means uniform, and finally may be simultaneously called upon to produce their books of account in support of returns before the officers of each State. The harassment to trades is quite obvious and needs no exaggeration.'[44] The majority judgment in the Bombay case had rightly held that 'the picture of harrassment and inconvenience to the traders is more imaginary than real'. If corporations carrying on inter-State trade are also exporters, as the Bengal Immunity Co. is, they would be performing all these functions with regard to every country to which they export their goods. The inconvenience, if

any, arises from the extent of their operations; they can certainly avoid it by not indulging in inter-State trade.

The Supreme Court ordered in this case that 'until Parliament by law provides otherwise, the State of Bihar do forbear and abstain from imposing Sales Tax on out-of-State dealers in respect of sales or purchases that have taken place in the course of Inter-State Trade or Commerce even though the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar.'[45] It is a curious order as orders by the highest Court of a country go. A Court, even the highest court, is supposed to interpret the law as it stands in application to a case brought before it. The present order does do so but adds a rider that the interpretation of the Court is subject to be changed if Parliament acts in a certain way. This is always the case, but why say so in the judgment? Is it intended to be a warning to the corporation that brought the suit that the protection granted to it by the Supreme Court is liable to be denied if Parliament undertakes to amend the law? If so, the Supreme Court was wrong in acting as the legal adviser of out-of-State dealers. As the present case showed, such dealers can amply afford the services of the highest legal talent in the country. The Constitution intended that the Supreme Court should render advice to the President alone.

The rider may be construed as a part of a conscience-easing process. Having held that the previous decision of the Supreme Court was wrong, the majority judges soften the pronouncement by hedging their decision with an advisory clause. But the rider becomes all the more meaningless when we find that though the majority concedes that "When Parliament in exercise of power vested in it by article 286(2) lifts the ban, those inter-State sales or purchases which fall within the explanation will be deemed to take place within the delivery State", it is not prepared to hold that on the lifting of the ban the delivery State will be entitled to make a law imposing taxes on such sales or purchases.[46]

Another curious feature of the proceedings in the Supreme Court was the appearance of the Attorney-General for India on behalf of the State of West Bengal. In 1953 he had appeared for

the Union of India as intervener. The published records do not seem to show what his position in that case was. It is doubtful, however, that he then supported the thesis which he put forward now on behalf of the Government of West Bengal and Tata Iron and Steel Co. which also he represented. If he had then held the view of the law which he expressed now, he should have then advised the Union Government about the interpretation of article 286 in the sense in which he was now interpreting it. The Government of India could have been pursuaded to get the necessary legislation through Parliament by way of abundant caution even though the Supreme Court had held that this was not necessary.

Another interesting feature of the case is that the published records of the case in the Supreme Court Reports include the arguments of the various counsels who argued the case before the Supreme Court. This was the first time this has been done and so far the last. The arguments for the various appellant do not add anything to our knowledge of the law on the subject. Most of the arguments which the majority of the Court has adopted are based on arguments considered in the earlier cases. There is nothing new which was not considered when the previous decision was given. As the Supreme Court had then declared, it had had 'assistance of full arguments dealing with all aspects of the case'.

The effect of the judgment was that no State could levy sale or purchase tax on out-of-State dealers for the goods sold by them for consumption in the State. As the levy of such tax was declared against the Constitution, the earlier collection and levy of the tax since 26 January 1950 also became illegal.[47] Those who had paid it, could probably demand refund of the amount paid by them. In their judgment the Supreme Court had been careful enough to add, 'it has not yet been decided by this Court that money paid under a mutual mistake of law induced by a wrong judicial interpretation of a Statute must necessarily be refundable as money had been received'.[48] But this could give little comfort to the States. They could be sued and if the Supreme Court held that they were liable to refund the tax they had collected, they would have been in difficulties. The Government of India, therefore, issued an Ordinance on 30 January, 1956, validating the levy and collection

of the tax retrospectively and save the States from the harassment which would have otherwise been caused to them. The ordinance was in due course replaced by an Act.[49]

There was however the future to be taken care of. It would have been inequitable if the State were to levy a sales tax on goods produced in the State and allow free entry of similar commodities produced elsewhere.[50] The question had reached the Union Government through another route as well. The Taxation Enquiry Commission appointed by the Union Government had examined the question as a part of the general scheme of taxation in the country. It had been impressed by the varying rates of taxation in the States. The list of articles taxed also varied from State to State. It recommended, therefore, that inter-State sales should be the concern of the Union. 'In broad terms the responsibility of the States may be said to end and that of the Union to begin when the Sales Tax law of one State impinges administratively on the dealers and fiscally on the consumers of another State. Broadly, therefore, the inter-State sales should be the concern of the Union'. 'The goods in the course of inter-State trade should, broadly speaking, be the sphere of the Union'. Leaving intra-State sales generally to the State Government, it further recommended that where finished goods are consumed in a State other than the one which taxes the raw material, such cases of intra-State trade should be brought under the full control of the Union.[50] To give effect to the recommendation of the Taxation Enquiry Commission as also as a sequel to the judgment of the Supreme Court the Sixth Amendment to the Constitution Act was passed by Parliament. The amendment places taxes on inter-State sales and purchases in the Union list and curtails the rights of the States to levy sales and purchase tax to that extent. The net proceeds of the tax shall be distributed among States where the tax is leviable in accordance with such principles as Parliament may by law frame. Parliament has been further empowered to determine by law principles whereby to define when a sale or purchase of goods takes place in the course of Inter-State trade or commerce. Having been approved by the legislatives of half the A and B States, the amending Act received

the assent of the President on September 11, 1956 and became effective.

Once again the Constitution has been amended following a decision of the Supreme Court. Most of the amendments would probably have been otherwise introduced as the result of governmental decision on the report of the Taxation Enquiry Commission. The reversal of its own earlier judgment by the Supreme Court has probably hastened the process of amendment. The new amendment, by way of abundant caution, specifically vests in Parliament the right to define principle on which sales and purchases can be considered to be in the course of inter-State trade and commerce. It may deprive the Supreme Court from tackling this controversial issue if Parliament exercises the power the Constitution now vests in it.

The Supreme Court's interpretation of a law has been nullified but it is not a case of the Court v. Parliament. The Court spoke with two voices as to what the law meant. Its new interpretation was not acceptable to three of the Judges who heard the case. Had the Chief Justice not been ill, the new interpretation may not have been given. It is also necessary to remember that the Supreme Court interprets the words in which the ideas of those who framed the Constitution have been clothed. The new amendment tries to make up for the failure of the framers of the Constitution to express themselves clearly and specifically at least to some judges of the Supreme Court. If the Supreme Court served a useful purpose by pointing out a possible ambiguity in the language of the Constitution, Parliament and the State legislatures have performed as meritorious a service by removing the ambiguity.

Though the question at issue has been otherwise decided, the problem of when the Supreme Court should reverse itself stays there. Even though the majority judgment seems to hold that a previous judgment may at any time be reversed when a different view of the law is possible, their laboured attempt to belittle the earlier decision in various ways leaves one with the impression that even the same majority would not countenance easily another attempt at persuading the Supreme Court to reverse itself. For another thing, such an occasion may not find the Chief Justice ill!

NOTES

1 'It is fundamental to the due administration of justice that the authority of the decisions be scrupulously respected by all courts. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain and the confidence of the public in it is ruined'. Renfrat, C.J. in Woods Manufacturing Company Ltd. v. the King, (1951) D.L.R. 475.

2 The United States Supreme Court gave only seven unanimous decisions in 41 public law cases in 1952. In India the Supreme Court Reports include 429 unanimous decisions from 1950 to 1955 (October) out of 464 cases reported.

3 The Indian Supreme Court was thus divided only twice (2 to 1 and 4 to 3) from January to October 1955 though 148 cases are reported for this period.

4 Cf. Franfurter J. in National Mutual Insurance Co. v. Tidewater Transfer Company, 337 U.S. 582, 655 (1949).

5 The Bengal Immunity Co. Ltd. v. The State of Bihar and others, 1955 2 S.C.R. 809.

6 Robinson v. National Trustees, (1927) A.C. 515.

7 *Supreme Court and Supreme Law* edited by Edmand Cahn 78.

8 Nicholas, *Australian Constitution*, 257, 259.

9 28. *C.L.R.* 129. In Mansell v. Beck (1956) A.I.R., 1121 the High Court of Australia refused to reverse its previous decision, even though it was asked to do so, on account of some of its earlier findings.

10 Engineer's case. 28 C.L.R. 129.

11 Justice Douglaus *Studies in American and Indian Constitution Law*, pp. 334 and 335.

12 Hapburn v. Griswold, 19 Lawyers' Edition 513 U.S.A. (1870).

13 The Legal Tender Case, 12 Wall. 457. (1871). On June 11, 1956 the Supreme Court held by a majority of 5 to 3 that the military courts can try the civilian dependents of military forces accompanying them abroad. On June 10, 1957 the Supreme Court completely reversed itself by 6 to 2.

14 Fairman in *Bacon Lectures*, 479.

15 Power v. Dinter 30 M.P.R., 1486 (1952).

16 *Supreme Court and Supreme Law*, 81, Cf. *Vagaries and Varieties in Constitutional Interpretation* by Thomas Reed Powell; *Judicial Legislation* by Fred V Cabil, *the Supreme Court* by Professor Barnand Schwarte; *Nine Men* by Fred Rodell.

17 1952 II S.C.R., Supplimentary note to the dissenting judgment of Jagannadhadas J. 757, 762.

18 1953 S.C.R. 1069 to 1129.

19 1954 S.C.R. 53 to 116.

20 1954 S.C.R. 1122 to 1128. It might be claimed that here the Court in the instant case was concerned with the question whether the earlier decision should be followed. But there is no reason why the Justices who were later on responsible for reversing the United Motors in Bengal Immunity case should not have declared themselves to that effect now.

21 1955 II S.C.R., 668.
22 1954 S.C.R., 660.
23 United States v. Rabinewitz, 339 U.S. 56 (1950).
24 1955 II S.C.R. 668, 857.
25 1955 II S.C.R. 661.
26 1953 S.C.R. 215 to 218.
27 1954 S.C.R. 1126.
28 1955 II S.C.R. 628. The decision of the Supreme Court of the United State re. the status of the civilians accompanying U.S. military personnel abroad was reversed in June 1957 just 364 days after an earlier decision. The earlier decision was a 5 to 3 majority. Justice Frankfurter had not voted in the earlier case as he was not ready with an opinion. He made up his mind now against the earlier verdict. Justice Harlan who had voted with the majority earlier now changed sides 'after an opportunity for greater reflection.' Two new justices had replaced two of the old majority. The reversal held by 6 to 2 that such dependents did not lose their civil rights and could not be tried by the military courts.
29 1955, II S.C.R. 631.
30 Cf. Sri Ram Sharma, *the Supreme Court and Judicial Review in India.*
31 1955 II S.C.R. 724A.
32 1955 II S.C.R. 676, 678.
33 The relevant passages from Justice Bhagwati's judgment are reproduced below in extenso.

'The majority judgment of this court delivered by Patanjali Shastri, C.J. with which Mukherji J. and Ghulam Hasan J. concurred held that article 286(1)(a) of the Constitution read with the explanation thereto and in the light of article 301 and 304 prohibits the taxation of sales or purchases involving inter-state elements by all States except the State in which the goods are delivered for the purpose of consumption therein. The latter State is left free to tax such sales or purchases.' (1955, II S.C.R. 676).

'The interpretation put on article 286 read with the explanation thereto was that the delivery State is left free to tax such sales or purchases as fall within the terms of the explanation.' (1955, II S.C.R. 678, 679). 'The majority judges held that the explanation converts the inter-State transaction into an intro-State one and therefore there is no scope at all for operation of clause (2) of article 286.' (Ibid. 681).

All this is followed by the surprising statements that 'the majority judgment in the Bombay Sales Tax Appeal did not say that the delivery State was entitled to tax the sellers in the transaction of sales or purchases covered hy the Explanation to article 286(1)(a). The question whether the seller or the purehaser would be subject to the levy of a tax on the transaction of sale or purchase at the instance of the delivery State was not before the Court. The observation contained in the judgment were made with reference to a pure question of the interpretation of article 286(1)(a) and the Explanation thereto.' (Ibid, 724, 725).

34 1955 II S.C.R. 640.
35 1955 II S.C.R. 646.

36 Justice A. K. Sarkar v. (A.I.R. 1958 S.C.R. 648) declared that the Supreme Court took the following view of the Explanation in the Bengal Immunity Company Case. 'There the avowed purpose of the Explanation is to explain what an outside sale referred to in sub-clause A is.'

37 1955 II S. C. R. 810.

38 Dissenting Judgment of Justice Roberts, 321 U.S. 96, 112 (1944).

39 1955 II S.C.R., 631.

40 Ibid, 631. Does the majority intend proclaiming that there are judgments of the Supreme Court which are *not* based on *sound* reason?

41 This tendency was exemplified, for example, in a Madras case, challenging the right of the Union Government to realise arrears of Income Tax as arrears of Land Revenue even though the Supreme Court had held this valid earlier in a Bombay case. The Madras case travelled right up to the Supreme Court where it was argued and finally disposed of in April 1957 by the Court's holding that it saw no reasons to upset its earlier decision. In re. Habeas Corpus petitions of Frey and Dana decided on 31st October 1957, the question whether a penalty imposed by the Collector of Customs on the accused constituted a prosecution and punishment was canvassed again even though in the Maqbool Hussain v. State of Bombay, it had been definitely held that such proceedings did neither form prosecution nor meted out punishment. Curiously enough, though the writ was not granted, Chief Justice S. R. Das on behalf of the Court declared that the Court did not find it necessary to express an opinion whether the words in article 20 do or do not contemplate only proceedings of the nature of criminal proceedings before a court of law or judicial tribunal as ordinarily understood. As explained elsewhere this was exactly what the Court had decided in Maqbool Hussain v. The State of Bombay (1953 S.C.R. 728).

42 1955 II S.C.R. 618.

43 In the United States corporations came to be held persons so far as benefits of the Fourteenth Amendment was concerned only in 1886. Max Lerner would have it that this was an exhibition of judicial backing of capitalism. Justice Black and Justice Douglas would not allow to the corporations today the privileges of either persons much less of citizens. Cf. Douglas in dissent with Black concurring in Wheeling Steel Corporation v. Glander, 33 U.S. 562, 576 (1950).

44 1955 II S.C.R. 632, 634.

45 1955 II S.C.R. 668.

46 Ibid, 727.

47 Following the judgment of the Supreme Court in this case, the Court held a similar provision of the Central Provinces and Bearar Sales Tax Act 1947 void on 12th October 1955. Earlier on 20th September the Supreme Court held by a majority of 4 to 1 that lifting of the ban by the President under Article 286(20) did not entitle a State to tax goods in the course of Inter-State trade. Following these decisions, the Hyderabad High Court held the levying of taxes on goods delivered within Hyderabad State for consumption therein from outside the State invalid.

48 Cf. 1955, II S.C.R. III 631.

49 The validity of the ordinance as well as of the Act was challenged in Sunderaramier and Co. v. State of Andhra. The Supreme Court, however upheld their validity. Justice A. K. Sarkar in dissent held that the Madras General Sales Tax Act of 1939 as amended by Adoptation of Laws Order of July 2, 1952, had not authorised the levying of the General Sales Tax on out-of-State sellers even when they sold goods for delivery in the State for consumption therein. A.I.R. 1958, S.C. 497 and 566.

50 Taxation Enquiry Commission Report, III, 54-55.

CHAPTER XIV

THE SUPREME COURT AND PARLIAMENT

When the Supreme Court strikes down a law as unconstitutional and void, it usually does so because the law offends against some provisions of the Constitution. The Constitution is the higher law and as such possesses an overriding authority. Various legislative bodies derive their authority to make laws from the Constitution and can obviously exercise that power only as long as such exercise remains within the four corners of the Constitutional limitations. An Act thus held inoperative may be bad as beyond the authority of the legislature enacting it. It or parts of it may be held unconstitutional as travelling beyond the orbit of permissible legislation on the subject. It may be held void and inoperative because it offends against the fundamental rights guaranteed to citizens or residents in the country. The enacting legislature may try to remove the virus of unconstitutionality by either retiring to its properly defined sphere or by removing the inconsistency with the fundamental rights. The decision of the Supreme Court then forms a guide to the legislature as to how to act in the matter. The law makers, once defeated, try to avoid failing the second time.

Occasionally however the legislature may not succeed in restoring constitutionality to its proposals even when the Supreme Court has shown the way. This happened when Taxes on Income Investigation Commission Act was attacked before the Supreme Court. The Act was passed in 1947 to provide an extraordinary instrument for bringing to book the large number of war profiteers who had succeeded in concealing their profits and thus evaded payment of taxes on their income and profits.[1] In most cases the Central Board of Revenue had information that certain persons had made profits but had not disclosed them. The existing powers and the procedure prescribed were, however, thought to be insufficient for the purpose of unearthing such cases. The Act gave the Central Government authority to set up a Commission for the

purpose of such investigation. The Government could refer cases of suspected evaders of taxes who had made substantial profits to the Commission which was given very comprehensive and drastic powers for dealing with the evaders. The information which the Government had was not considered to be exhaustive. The Commission was, therefore, given powers to report to the Government cases of persons who had made profits but had succeeded in concealing them if in the course of its investigation into other cases it came across such—or what it suspected were such—cases. The Government could then refer those cases to the Commission for investigation.[2]

The Central Government referred the case of Messrs. Jute and Gunny Brokers Ltd. to the Investigation Commission.[3] During the course of its investigation, it was said to have discovered that an allied concern, Messrs Suraj Mal Mohta and Co., had made secret profits which it had failed to disclose and had thus evaded payment of taxes on them. On the Commission's reporting the case to the Central Government, it was referred to them for investigation on September 9, 1953.[4] The Commission called upon the suspected evaders to furnish necessary information in the form the Commission had devised for such inquiries. On April 12, 1954 Messrs Suraj Mal Mohta and Co. approached the Supreme Court praying that an appropriate writ be granted restraining the Commission from taking any action against them as the Taxes on Income Investigation Commission Act had become void after the Constitution's becoming operative in 1950.

During the course of the appeal the impugned Act was attacked as being discriminatory. It was contended that section 5(1) which allowed the Government to refer cases of persons who had made substantial profits to the Investigation Commission differentiated between them and other persons whose cases were not so referred to the Commission.[5] Section 5(4) under which the appellants were being proceeded against was attacked as being still more drastic than section 5(1). Whereas only those who had made substantial profits could be dealt with under section 5(1), the Commission could, under section 5(4), bring any case it happened to discover during its investigation under its purview by referring

it to the Government of India and securing its order for investigating the same. As the object of the impugned Act was to deal more effectively with evaders, the procedure prescribed by the Act for making investigation was of a summary and drastic nature. In certain important aspects it was detrimental to the persons subjected to it. The Supreme Court[6] held that 'any case' of evasion discovered by the Commission and its subsequent investigation by the Commission subjects persons whose cases were investigated to a discriminatory and prejudicial procedure as compared with other persons similarly situated but dealt with under the ordinary procedure of the Income-Tax Department. It held that sub-section 4 of section 5 of the Taxation on Income Investigation Commission and the procedure prescribed by the Act was hit by article 14 of the Constitution and was void and unenforceable to the extent of its repugnancy to the provisions of article 13(1). The Court refrained from expressing any opinion as to the constitutionality or otherwise of section 5(1) of the impugned Act.

'Defects in the classification made under section 5(1) of the Taxes on Income Investigation Commission Act, 1947, pointed out during the discussion in Suraj Mal Mohta's case in the Supreme Court'[7] led to the passage in Parliament of the Indian Income-Tax Amendment Act of 1954. It tried to bring persons covered by section 5(1) of the Taxes on Income Investigation Commission Act, 1947 within the purview of the ordinary jurisdiction of the Income-Tax Department. The amendment inserted sub-section 1(A) in the Indian Income-Tax Act with a view 'to provide for assessment or re-assessment of persons who to a substantial extent had evaded payment of tax during a certain period and for matters connected therewith'.[8] The language employed bears close resemblance to that employed in section 5(1) of the impugned Act. The new sub-section tried to cure the defects pointed out in section 5(1). It was argued that the word substantial in section 5(1) had no fixed meaning. Section 34(1A) cured this defect by enacting that an income of and above a sum of Rs. one lakh alone would come within the meaning of the expression. Another line of attack had been that the section 'did not

necessarily deal with persons who during the war period had made huge profits'. The amended section 34 remedied this defect also. It was to operate on incomes made between September 1, 1939 and March 31, 1946.

All this seems to have been done in order to rebut the charge that the persons attracted by section 5(1) were not covered by the Indian Income-Tax Act. The legislature's answer was to make such persons answerable under the Income-Tax Act as well so that the virus of discrimination could thus be removed.

This amendment however failed to produce the desired effect. Shri Meenakshi Mills Ltd., had been proceeded against under section 5(1) of the Act of 1947[9]. It filed an application in the Supreme Court asking for a writ restraining the Commission from proceeding further with its case. Before the petition had been heard, the Income-Tax Amendment Act 1954 was passed. The appellant obtained the leave of the Court to add an additional ground attacking the Act because the amended Section 34 of the Income-Tax Act was comprehensive in its scope and all persons who were dealt with under section 5(1) of the Act of 1947 had been brought within its ambit. That being so there was no basis left for giving them discriminatory or special treatment different from those similarly situated and who were to be dealt with under section 34 of the Indian Income-Tax Act.[10] The Supreme Court held that 'the provisions of the section 5(1) of Act XXX of 1947 could only be supported, if at all, for differential treatment of persons dealt with in that section in matters of procedure on the ground that these persons constituted a separate class and the classification was rational. Parliament has however by amending section 34 of the Indian Income-Tax Act now provided that cases of these very persons who originally fell within the ambit of section 5(1) of Act XXX of 1947 can be dealt with under the amended section 34 and under the procedure provided in the Income-Tax Act. Both categories of persons, those who come within the ambit of section 34 and those who come within the scope of section 5(1), now formed one class. That being so the only basis for giving them differential treatment, namely that they formed a distinct class by themselves, had completely disappeared. The field on which amended section

34 operated now includes the strip of territory which previously was occupied by section 5(1) of Act XXX of 1947. Two substantially different procedures, one being more prejudicial to the assessees than the other, can not be allowed to operate on the same field in view of the guarantee of article 14 of the Constitution.'[11] The Court, therefore, declared that 'assuming that provisions of section 5(1) of Act XXX of 1947 could be saved from the mischief of article 14 on the basis of a valid classification, that defence is no longer available in support of it after the introduction of the new sub-section in section 34 of the Indian Income-Tax Act which sub-section is intended to deal with the same class of persons dealt with by section 5(1) of the impugned Act. The result is that proceedings before the Investigation Commission can no longer be continued under the procedure prescribed by the Impugned Act.' The Commission was, therefore, prohibited from further proceeding with the cases of these petitioners under Act XXX of 1947.[12]

The earlier decision had made it impossible for the Commission to deal with cases it had 'discovered'.[13] Parliament's labour to save the Act resulted in the Commission's being deprived of the authority to deal with unfinished cases originally referred to it.[14]

The Meenakshi Mill case however did not see the end of the matter so far as the Income-Tax Investigation Commission Act was concerned. In M. Ct. Muthiah and two others v. the Commissioner of Income-Tax Madras and another,[15] the competence of the Commission to have continued functioning by a summary and drastic procedure after the Constitution had come into force was directly challenged. In Suraj Mal's case the Supreme Court had not thought it necessary to pronounce on the validity of section 5(1) of the Act. The Meenakshi Mill case was disposed of by assuming that it was valid. The first decision had dealt with the cases discovered by the Commission. The Supreme Court had declared that after 26 January 1950 the Commission had no authority to deal with such cases. The second decision dealt with the cases under section 5(1) which had not yet been finished and restrained the Commission from dealing with them any further. But there were cases which had been dealt with and over. Here appropriate orders of assessment had been passed. The Supreme

Court had held that the work of the Commission up to 25 January 1950 was perfectly valid and could not be challenged. Now an assessee who had been dealt with by the Commission after 1950 and assessed to Income-Tax thereafter challenged the assessment.[16] Justice Bhagwati[17] for a divided court now rebutted the assumption which had inspired Chief Justice Mahajan's judgment in Meenakshi Mill case. Chief Justice Mahajan had not decided that persons falling under section 5(1) formed a class, he had only assumed it.[18] Section 5(1) dealt with cases in which the Central Government had reasons to believe that substantial profits had been made. Originally it could refer such cases to the Commission upto 30 June 1948. This was extended to 1 September 1948. Was the reference, selective reference let us say, by a particular date the main characteristic of the class or their being suspected of having made substantial profits and evaded payment of tax on income the basis of classification? Even though earlier the Supreme Court had held that an accused could not claim that all persons in his class be tried under the same special procedure, Justice Bhagwati now apparently held that because all persons who had made substantial profits and evaded payment of tax on income were not and could not be reached by the Commission, therefore, those who were reached could not form a class. He seems to have been anxious to discover support for his decision in the earlier judgment of Chief Justice Mahajan and quoted him at length and some times to no avail. He held for the Court that 'the field on which amended section 34(1) operated from and after January 26, 1950', all evaders of tax, 'included the strip of territory which was occupied by section 5(1) of Act XXX of 1954,'[19] earners of substantial profits and evaders of tax. This argument seems to ignore the fact that, however definitely a class might have been defined in section 5(1), as for example in amended Section 34(1A), it would have remained a strip of territory within the field of Section 34(1), as amended in 1948. But this would not have prevented the evaders discovered under section 5(1) from forming a class by themselves made up of war-profiteers with very substantial incomes which had escaped taxation. The Court however refused to recognize this small but substantial class. Naturally it declared that two substantially

different laws of procedure, one being more prejudicial to the assessee than the other, could not be allowed to operate on the same field in view of the guarantee of article 14 of the Constitution.[20] The Court held that 'those cases which were pending on January, 26, 1950 before the Income-Tax Officers concerned in pursuance of directions given by the Central Government would be hit by article 14 and would be invalidated.'[21] The Court here did not stop to consider, as it had done in the case of Qasim Razvi,[22] whether the part of the procedure which applied to these assessees was in its post-Constitution portion prejudicial to these assessees in fact. Justice Jagnnadhadas in dissent held that Section 34(1) as amended in 1948 did not cover the same ground as section 5(1) and therefore the impugned Act was constitutional.[23]

NOTES

1 S. 3 of Taxation on Income (Investigation Commission) Act, 1947.
2 Suraj Mal Mohta and Co. v. A. V. Viswanth Sastri. 1955—I S.C.R. 448.
3 Ibid., 449.
4 Ibid., 450.
5 Ibid., 457.
6 Ibid., 466.
7 Shree Menakshi Mills Ltd. v. A. V. Visvanatha Sastri, 1955 I S.C.R. 796.
8 Ibid., 796.
9 Ibid., 787.
10 Ibid., 793.
11 Ibid., 795.
12 Ibid., 798.
13 Suraj Mal Mohta and Co. v. A. V. Visvanath Sastri, 1955, I S.C.R. 448.
14 Shri Meenakshi Mills Ltd. v. A. V. Visvanath Sastri, 1955, I S.C.R. 777.
15 M. Ct. Muthiah and two others v. Commissioner of Income-Tax and another 1955, II S.C.R. 1247.
16 Ibid., 1251.
17 Justice Bhagwati in M. Ct. Muthiah and two others v. Commissioner of Income-Tax, Madras, 1955, II S.C.R. 1255.
18 Mahajan C.J. in Shree Meenakshi Mills Ltd. v. A. V. Visvauath Sastri, 1955, I S.C.R. 794.
19 Bhagwati J. in M. Ct. Muthiah and two others v. The Commissioner of Income-Tax, Madras and another. 1955, II S.C.R. 1264.
20 Ibid., 1264.
21 Ibid., 1264.
22 Cited above in note 7 to chapter XII.

23 Jagannadhadas J. Dissenting in M. Ct. Muthiah and two others v. The Commissioner of Income-Tax, Madras and another, 1955, II S.C.R. 1284.

Postscript : In another amendment of the Income-Tax law following a decision of the Supreme Court, Parliament was more successful. In Bidi Supply Co. v. the Union of India. the Supreme Court held the order of the Central Board of Revenue transferring the entire assessment proceedings against appellant from where his head office was illegal under the provisions of Indian Income-Tax Amendment Act 1940, because not 'a case'—a pending case—had been so transferred but all proceedings in future as well. Parliament thereupon added as Explanation to section 5(7A) of the Act defining a case as 'meaning all proceedings pending or to be commenced after the order of transfer'. Cases transferred thereafter survived the scrutiny of the Supreme Court in Pannalal Binjaraj v. Union of India, 1957 S.C.R. 233.

CHAPTER XV

SUPREME COURT AND AMENDMENTS TO THE CONSTITUTION OF INDIA

The Constitution of India was adopted on 26 November 1949 and became effective on 26 January 1950. Since its inception, ten attempts have been made to amend it. Two of these ten amending bills were introduced by private members. Eight amendments were officially proposed and seven have been adopted during the last eight years.

Two of these eight amendments concerned comparatively minor matters. The Second Amendment Act kept the membership of the House of the People at 500 from the States and therefore repealed the provision that there should be at least one representative for every 50,000 people. The Fifth Amendment Act authorised the President to put a time limit to the States giving their opinions on proposals for reorganisation of the States sent to them by him.

The Third Amendment Act made the temporary power given to the Union for the control of production and distribution of essential commodities permanent. The First Amendment Act also carried through certain minor changes in the Constitution besides the major changes effected by it which are discussed below. A part of the Ninth Amcndment Act was necessitated (on adoption of the Seventh) by major changes in the reorganisation of the government in the country prior to the redistribution of its territories into new and bigger units.

The major amendments of the Constitution have usually followed the judicial attacks on governmental power. Of course the judiciary in India does not go about challenging the administrative acts or legislation passed by representative assemblies. When cases brought before the court turn on the interpretation of an existing law, the courts may have to examine the validity, under the Constitution of India, of the impugned law.

Most of the cases brought to the Supreme Court for the interpretation of the Constitution sought to get impugned laws, State

or Union, declared unconstitutional because, it was claimed, they took away fundamental rights guaranteed to the citizens in the Constitution.[1] Here again two rights occupied the place of honour in the litigation brought to the Supreme Court, the right to property and the right to freedom of expression. It turned out sometimes that the constitutional draftsmen had not been able to clothe their intentions comprehensively and clearly. Of course, some issues were re-examined in the light of judicial decisions. In some cases, it was thought necessary to amend the Constitution so as to put the intentions of the framers beyond doubt or to embody changes otherwise thought necessary.

The first Bill to amend the Constitution of India was introduced in Parliament on 12 May 1951. The statement of its objects and reasons declared: 'During the last fiteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements, especially in regard to the chapter on Fundamental Rights. The citizen's right to Freedom of Speech and Expression guaranteed by article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocated murder and other crimes of violence'. The Supreme Court had held on 26 May 1950 in Romesh Thapper v. The State of Madras[2] that under the article 19(2) freedom of speech and expression guaranteed under the Constitution could be abridged, except in case of libel or slander, only when its exercise undermines the security of the State or tends to overthrow the State. The judgment of the Court was misunderstood and misapplied—as the Supreme Court held in appeal in 1952—and construed as laying down the wide proposition that 'restrictions of freedom imposed generally in the interests of public order are outside the scope of the Constitution'. Following the lead of the Supreme Court—erroneously as it eventually transpired—the Patna High Court held in re Bharati Press that incitement to murder was not actionable under the Constitution. 'If a person were to go on inciting murder or other cognizable offences either through the press or by word of mouth, he would be free to do so in as much as he would claim the privilege of exercising his fundamental right of freedom of speech and expression!'[3] The

Punjab High Court had also come to the same conclusion in Amarnath v. State of Punjab.[4] Appeals were lodged against both the decisions to the Supreme Court. The Government of India had, however, to take immediate action. It may have becn partly encouraged therein by the observation of Justice Patanjali Sastri in his judgment in Romesh Thapper's case wherein he had declared that in the Indian Constitution very narrow and stringent limits, 'have been set to permissible legislative abridgment of the right of free speech and expression'.[5] In his judgment Justice Patanjali Sastri had referred to the Irish Constitution where the freedom of speech and expression could be abridged for undermining public order.[6] The First Amendment to the Constitution Act therefore, amended article 19(2) so as to provide that reasonable restrictions could be imposed on freedom of speech and expression, 'in the interests of security of the state, friendly relations with foreign States and public order'. 'The very narrow and stringent limits on legislative abridgment' were made thus less stringent, but the freedom of speech and expression was widened by providing that all its abridgment had to be reasonable to the satisfaction of a Court. This was a doubtful gain. Unlike the provision in the Irish Constitution to which Justice Patanjali Sastri had referred, the new amendment made valid reasonable restrictions made *in the interest of public order.* As the Supreme Court put it in Ramjilal Modi v. The State of U.P.[7] the expression *in the interest of* made the ambit of the restrictions very wide. 'A law may not have been designed directly to maintain public order and yet it may have been enacted in the interest of public order.' As the cases coming to Court thereafter have proved any restriction on the enjoyment of freedom of speech and expression can be easily claimed to be in the interest of public order.

Following the introduction of communal representation in the legislatures in India in 1909 an unfortunate tendency started whereby not only loaves and fishes of office came to be divided communally but even admission to educational institutions, was so regulated. When the constitution went into effect such orders obviously became void. The most blatant of these orders was a

government resolution in Madras which divided public services not on merit but on the basis of alleged redressing of inequalities of representation of various castes and communities in the services. An aggrieved candidate for public service challenged his rejection as being discriminatory and the Supreme Court struck down the order in Venkataramana v. The State of Madras.[8]

But it is laid down in article 46 as a directive principle of state policy that the state should promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. In order that any special provision that the state may make for the educational, economic or social advancement of any backward class of citizens may not be challenged on the ground of being discriminatory, article 15(3) was amended by the First Amendment Act. As amended it placed 'any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes', beyond attack on the ground of its being discriminatory.

While the Constitution was being framed by the Constituent Assembly, the Legislative Assemblies of various provinces were busy passing legislation carrying out agrarian reforms. The framers of the Constitution probably considered that sections 4 and 6 of article 46 would safeguard such legislation. It was not to be expected, however, that the powerful interests involved would be prevented from challenging legislation abolishing zamindaries in the various provinces and making the cultivators proprietors of the land. In Kameshwar Singh v. the State of Bihar,[9] the Patna High Court held that the Bihar Land Reforms Act, 1950 was unconstitutional and void as it infringed article 14 of the Constitution. The Allahabad[10] and Nagpur High Courts[11] however upheld the validity of similar legislation passed in the Uttar Pradesh and the Madhya Pradesh. Of course appeals could have been preferred, and were preferred, in the Supreme Court by either of the parties. But litigation is a long process and would have certainly delayed bringing the proposed laws into effect. The Governments would not have been allowed to carry through the agrarian reforms till the cases had been finally disposed of in the

highest court in the land. It may also have been felt that probably sections 4 and 6 of article 46 of the Constitution may not prove enough for the purpose the framers had in view. The First Amendment to the Constitution Act sought a short cut for fully securing the constitutional validity of certain specified State Acts abolishing zamindari. Article 31-A and 31-2 were inserted in the Constitution and the ninth schedule added thereto. The schedule places specified Acts passed by the five States as beyond attack on the ground of their being in conflict with any fundamental rights.

The State in India has been carrying on business and industry, sometimes even to the exclusion of all other competitors. When the Constitution was framed and the fundamental right to equality guaranteed, its full implication seemed to have been missed by the framers. It seems to have been argued that if the State could run railways or telegraphs as a monopoly, it could as well run its own fleet of buses to the exclusion of other competitors. The Government of U.P. had started running buses in 1947 on certain roads. Under the Motor Vehicles Act, 1939, they did not have to obtain permits for running government vehicles on roads. After running the buses as one of the parties, they started claiming a monopoly on some of the routes by cancelling permits already issued or refusing to issue new permits. This was challenged. The High Court held that nationalisation of an industry was not possible by mere executive order; even if authorised by a legislative enactment the necessary legislation would probably have to be justified as a reasonable restriction under article 19(6) of the Constitution. The U.P. Road Transport Act was passed in 1951 and became law on 10 February 1951. This got over the Allahabad High Court's objection that nationalisation without legislative authority was not possible. But the Court had hinted that the Government would have to prove under article 19(6) of the Constitution whether the restriction on the private owners not to ply buses was in public interest. This may not have been easy to do. Section (3) of the First Amendment Act amended article 19 clause 6, whereby State monopoly in trade, business, industry or service was authorised.

In the litigation that followed it was discovered that some of the changes introduced in the Constitution failed to serve the pur-

pose which they were intended to serve. In Saghir Ahmed v. the State of U.P. and others,[12] Justice Mukherjea speaking for the whole Court, was not satisfied that the amendment of the article 19 of the Constitution had put beyond attack the creation of trade monopoly in the favour of the State. It was suggested, though not decided, that in spite of the amendment of article 19, state monopoly might be attacked as not being in public interest or as not amounting to a reasonable restriction on freedom of trade and commerce, as defined in Part XIII of the Constitution.[13] It was suggested that the legislature might take these matters into consideration if and when they think of legislating on this subject.[14]

This was done in the Fourth Amendment Act. Clause 4 of the Fourth Amendment to the Constitution Act amended article 305 of the Constitution making it impossible to attack the statutory creation of state monopoly in trade, industry or commerce.

The interpretation by the Supreme Court of article 31, clauses 1 and 2, showed a progressive widening of the concept of property. Whereas in Chiranjit Lal's case[15] it had held in 1950 that Sholapur Spinning and Weaving Mill Ordinance and Act valid, even though these had deprived a shareholder of some of his rights in his share, in Dwarkadas Shrinivas v. Sholapur Mills,[16] it redefined property as 'connoting a bundle of rights' exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorpreal rights. Whereas deprivation of property and its acquisition had been distinguished in the earlier case, deprivation of property was now equated by a majority of the Court to the acquisition of property.[17] In Commissioner Hindu Religious Endowment v. Shri Laxmindra Tirth Swamiar,[18] it was said: 'there is no reason why the word 'property' used in 19(1)(f) should not be extended to those well recognised types of interests which have the insignia or the characteristic of proprietory rights. We would prefer to proceed on the footing that article 19(1)(f) applies equally to concrete as well as abstract right of property'. It applied it to the rights and privileges which a Mahant enjoyed as the religious head of a Math.[19]

In the State of Bihar v. Sir Kameshwar Singh of Darbhanga and others,[20] Justice Mahajan had held that 'courts cannot exa-

mine either the extent or the adequacy of provisions of compensation contained in any law dealing with the acquisition of a property compulsorily acquired for a public purpose'. Though he was confining himself to the legislation already in force under article 34(4) of the Constitution, his decision had been wrongly taken as an interpretation of article 31(2) as well. Justice Das in the same case had uttered a warning. 'If a principle of compensation has been laid down in the Act, but that principle does not in fact produce any compensation in any rare case or adequate compensation in some cases, the result may offend against provisions of article 31(2)'.[21] But in the West Bengal v. Mrs. Bella Banerji,[22] the Supreme Court definitely held for the first time that 'the principles determining the amount of compensation laid down by the legislature must insure that what is determined as payable must be a just equivalent—just in the eyes of the Court—of what the owner has been deprived of.' When the First Amendment Act was passed, it had been intended to place the quantum of compensation beyond attack in courts. The judicial pronouncements noted above and similar others, however, seemed to suggest that the amendment had not served its purpose. Deprivation of property had originally been conceived as something different from requisition and acquisition, but this had turned out not to be so in law.

The Fourth Amendment to the Constitution Act placed the laws fixing the amount of compensation or the principle on which such compensation was to be determined beyond attack in any court on the ground that the compensation provided by that law is not adequate. The distinction between deprivation or requisition and acquisition of property was re-written into the Constitution. Where ownership is not transferred or the right to possess any property not acquired by the state, it is declared, there is no acquisition or requisition notwithstanding the fact that some of the rights comprising the property had been taken away by the state. In State of West Bengal v. Subodh Gopal Bose[23] it had been hinted at that a wider interpretation of the term property may lead to challenging the validity of such regulatory measures as the Insurance Amendment Act, 1950, Railway Companies (Emergency Provisions) Act, 1951, and Industries (Development

and Regulation) Act, 1951. Section 3(1) of the Fourth Amendment Act protected, probably by way of abundant caution alone, several types of social legislation that had already been passed or were to be passed by putting them beyond attack as abridging any of the rights conferred by articles 14, 19 and 31. Thus the acquisition by the state of any estate or of any rights therein or the extinguishment or modification of such a right were protected. The principle of the Sholapur Spinning and Weaving Mill Act was re-affirmed by authorizing the state to take over the management of any property for a limited period in public interest or to secure its proper management. The Reserve Bank of India had been empowered to order, where necessary, in public interest or for securing the proper management of any banking corporation, the amalgamation of two or more such corporations. This and similar action were now granted protection. The Indian Companies Act passed recently had assumed power to extinguish or modify rights of managing agents, secretaries and treasurers and managing directors or managers of corporations or the voting rights of the shareholders. Such legislation again was placed beyond attack. In its search for minerals and mineral oils, it was felt that the government may have to terminate prematurely or cancel agreements, leases or licenses granted for the purpose of searching for or winning any minerals or mineral oil. Sometimes rights arising under such agreements, leases or licenses may have to be extinguished or modified. Such legislation would not be open to attack for its offending any or all of the provisions in articles 14, 19 and 31.

Again, probably by way of abundant caution, the creation of State monopolies was protected. Specified Acts about the resettlement and rehabilitation of displaced persons in Bihar, U.P. and West Bengal were made a part of the Constitution by being placed in the Ninth Schedule covering earlier land Acts. A part of the recent legislation about insurance, development and regulation of industries and the Railway Companies (Emergency Provisions) Act of 1951 were similarly made immune from judicial attack.

It may be said that private property has been subjected to various controls and regulations. It may also be objected to that decisions of the Supreme Court have been nullified. The Consti-

tution of India has neither protected Acts of Parliament nor decisions of the Supreme Court against change. When the Supreme Court held certain State Acts or Union Acts against the Constitution, its decision did not always carry any moral judgment. All that was implied was that there was clash between statutory law and provisions of the Constitution. Which of the two were to be changed in order to create social harmony was a political question which, as the Supreme Court in the United States has been emphasising so often, is for the elected representatives of the people to decide.[24] It is no slur on the Supreme Court that it pointed out the conflict. The Parliament need not be condemned either for removing the causes or producing the conflict.

In the United States, a very large part of the litigation in the Supreme Court turns on what is called the 'commerce clause' of the Constitution. An attempt was made in drafting the Constitution of India to avoid some of the pitfalls disclosed in the American cases on the subject. Notwithstanding all the care that was taken, the articles of the Indian Constitution covering inter-State trade and commerce have given some cause for reflection. Freedom of trade, commerce and intercourse throughout the territory of India has been guaranteed in article 301. Article 304 allows a State to impose countervailing taxes on goods imported from other States so as not to distinguish between imported goods and goods manufactured or produced in the State paying state duties. Article 286 lays restrictions on the imposition of the sale or purchase of goods in the course of inter-State trade. An Explanation at the end of article 286(1), following decisions by the Supreme Court in the United States, created a legal fiction and declared that 'a sale or purchase shall be deemed to have taken place in the State in which the goods were delivered for the purposes of consumption in the State'.

The United Motors Co., Ltd. challenged the validity of the Bombay Sales-Tax Act of 1952 as offending against article 286 of the Constitution. A similar case came to the Court from Travancore-Cochin as well. On 30 March 1953 the Supreme Court held by a majority of 4 to 1 that under explanation to article 286(1), the State in which goods were delivered for consumption had the

right of taxing the out-of-State seller who sold goods for such delivery.[25] The judgment to the same effect in the Travancore-Cochin case was delivered on 8 May 1953.[26] The Bombay judgment was referred to with approval in Himatlal Harilal Mehta v. Madhya Pradesh.[27] Under the scheme of the article so interpreted, an out-of-State seller paid the tax not out of his own pocket but passed it on to the buyer. He became a 'collector of the Tax' on behalf of the State and had the additional advantage of collecting the amount of Tax due from his buyers in advance but paying it to the State on specified dates.

On 3 September 1955, the Supreme Court reversed its earlier decision and in the Bengal Immunity Co. v. State of Bihar[28] held that the delivery State was not empowered to tax out-of-State sellers for goods delivered in the course of inter-State trade for consumption in the State. This might have subjected to a good deal of difficulty the governments of several States where the sales-tax on out-of-State dealers was being levied. The Government of India promulgated an ordinance on 30 June 1956 validating the levy and collection of the Tax retrospectively.[29] The sixth Amendment to the Constitution Act was adopted in 1956 suitably modifying article 286 and the list of Union and State subjects so as to transfer to the Union Government the right of levying Taxes on inter-State sales for distributing the net proceeds thereof among the various States.

NOTES

1 In 1957 the Supreme Court disposed of 228 petitions for the enforcement of the Fundamental Rights as against 136 appeals turning on the interpretation of the Constitution.
2 1950 S.C.R. 602, 594 (Romesh Thappar v. The State of Madras).
3 A.I.R. 1951 Patna 12 (In re-Bharati).
4 Amarnath v. Punjab, A.I.R. (1951) Punjab, 18.
5 1950 S.C.R. 602; Romesh Thapper v. The State of Madras.
6 Ibid.
7 A.I.R., 1957 S.C. 62.
8 Venkataraman v. State of Madras, A.I.R. 1951 S.C. 229.
9 A.I.R. 1950 Patna 392.
10 Ram Krishna v. Radhamal, A.I.R. 1952 Allahabad 697.
11 Orders passed by the Nagpur High Court on 9 April 1951.

12 Saghir Ahmed v. State of Uttar Pradesh, 1955, I S.C.R. 707.
13 Ibid. 711.
14 Ibid. 732-733-734.
15 1950 S.C.R. from 869 to 949.
16 1954 S.C.R. 737.
17 1954 S.C.R. 1019.
18 1952 S.C.R. 935-36.
19 Ibid. 983.
20 1952 S.C.R. 889.
21 1952 S.C.R. 1087.
22 1954 S.C.R. 563.
23 1954 S.C.R. 587.
24 Cf. *Constitution of the United States*, edited by Corwin.
25 1953 S.C.R. 1085.
26 1954 S.C.R. 53.
27 1954 S.C.R. 1122.
28 1955 II S.C.R. 603.

APPENDIX I

RELEVANT PROVISIONS OF THE CONSTITUTION OF INDIA AS ADOPTED IN 1949

15.(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

19.(1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to acquire, hold and dispose of property; and

(c) to practise any profession, or to carry on any occupation trade or business.

(2) Nothing in sub-clause (a) of clause (I) shall affect the operation of any existing law in so far as it relates to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the State.

31.(1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2) made by the legislature of a State shall have effect unless such law having been reversed for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 399 of the Government of India Act, 1935.

286(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

EXPLANATION. For the purpose of sub-clause (a), a sale or purchase shall be deemed to have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commence-

ment of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

298. (1) The executive power of the Union and of each State shall extend, subject to any law made, by the appropriate Legislature to the grant, sale, disposition or mortgage of any property held for the purposes of the Union or of such State, as the case may be and to the purchase or acquisition of property for those purposes respectively, and to the making of contracts.

(2) All property acquired for the purposes of the Union or of a State shall vest in the Union or in such State, as the case may be.

305. Nothing in article 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise provide.

SEVENTH SCHEDULE

Union List

33. Acquisition or requisitioning of property for the purposes of the Union.
36. Currency, coinage and legal tender; foreign exchange.
38. Reserve Bank of India.
42. Inter-State trade and commerce.
67. Ancient and historical monuments and records, and archaeological sites and remains declared by Parliament by law to be of national importance.

State List

12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by Parliament by law to be of national importance.
24. Industries subject to the provisions of entry 52 of List I.
54. Taxes on the sale of purchase or goods other than newspapers.

Concurrent List—III

40. Archaelogical sites and remains other than those—declared by Parliament by law to be of national importance.

APPENDIX II

AMENDMENTS TO THE CONSTITUTION

1

The Constitution (First Amendment) Act, 1951

2. To article 15 of the Constitution, the following clause shall be added :—

"(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

3. (1) In article 19 of the Constitution,

(a) for clause (2), the following clause shall be substituted and the said clause shall be deemed always to have been enacted in the following form, namely:—

(2) "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence".

(b) in clause (6), for the words beginning with the words "nothing in the said sub-clause" and ending with the words "occupation, trade or business", the following shall be substituted, namely :—

"nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise".

(2) No law in force in the territory of India immedlately before the commencement of the Constitution which is consistent with the provisions of article 19 of the Constitution as amended by subsection (1) of this section shall be deemed to be void, or ever to

have become void, on the ground only that, being a law which takes away or abridges the right conferred by sub-clause (a) of clause (1) of the said article, its operation was not saved by clause (2) of that article as originally enacted.

EXPLANATION.—In this sub-section, the expression "law in force" has the same meaning as in clause (1) of article 13 of the Constitution.

4. After article 31 of the Constitution, the following article shall be inserted, and shall be deemed always to have been inserted namely:—

"31 A. *Saving of laws providing for acquisition of estates*, etc.—(1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(2) In this article,

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir*, *inam* or *muafi* or other similar grant;

(b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue."

5. After article 31A of the Constitution as inserted by section 4, of the following article shall be inserted, namely :—

"31 B. Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or even to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

14. After the Eighth Schedule to the Constitution, the following schedule shall be added, namely:—

NINTH SCHEDULE

(Article 31B)

1. The Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950).
2. The Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act LXVII of 1948).
3. The Bombay Maleki Tenure Abolition Act, 1949 (Bombay Act LXI of 1949).
4. The Bombay Taluqdari Tenure Abolition Act, 1949 (Bombay Act LXII of 1949).
5. The Panch Mahals Mehwassi Tenure Abolition Act 1949 (Bombay Act LXIII of 1949).
6. The Bombay Khoti Abolition Act, 1950 (Bombay Act VI of 1950).
7. The Bombay Paragana and Kulkarni Watan Abolition Act, 1950 (Bombay Act LX of 1950).
8. The Madhya Pradesh Abolition of Proprietory Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951).
9. The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948).
10. The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras Act I of 1950).
11. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act I of 1951).
12. The Hyderabad (Abolition of Jagirs) Regulation, 1358 F. (No. LXIX of 1358, Fasli).
13. The Hyderabad Jagirs (Commutation) Regulation, 1359 F. (No. XXV of 1359, Fasli).

(b)

The Constitution (Third Amendment) Act, 1954

2. In the Seventh Schedule to the Constitution, for entry 33 of List III, the following entry shall be substituted, namely:

"33. Trade and commerce in, and the production, supply and distribution of,

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) food stuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, and cotton seed; and

(e) raw jute".

(c)

The Constitution (Fourth Amendment) Act, 1955

2. In article 31 of the Constitution, for clause (2) the following clauses shall be substituted, namely :—

"(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2) (A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisition of property, notwithstanding that it deprives any person of his property".

3. In article 31a of the Constitution,

(a) for clause (1), the following clause shall be, and shall be deemed always to have been, substituted, namely :—

"(1) Notwithstanding anything contained in article 13, no law providing for.

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of

searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by article 14, article 19 or article 31.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent"; and

(b) in clause (2),

(i) in sub-clause (a) after the word 'grant' the words 'and in the States of Madras and Travancore-Cochin any *janmam* right' shall be, and shall be deemed always to have been, inserted; and

(ii) in sub-clause (b) after the word 'tenure-holder', the words '*raiyat*, *under-raiyat*' shall be, and shall be deemed always to have been, inserted.

4. For article 305 of the Constitution, the following article shall be substituted, namely;

305. Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct; and nothing in article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub-clause (ii) of clause (6) of article 19".

5. In the Ninth Schedule to the Constitution, after entry 13, the following entries shall be added, namely:—

14. The Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 (Bihar Act XXXVIII of 1950).

15. The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U.P. Act XXVI of 1948).

16. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act IX 1948).

17. Sections 52A to 52G of the Insurance Act, 1938 (Act IV of 1938), as inserted by section 42 of the Insurance (Amendment) Act, 1950 (Act XLVII of 1950).

18. The Railway Companies (Emergency Provisions) Act, 1951 (Act LI of 1951).

19. Chapter III-A of the Industries (Development and Regulation) Act, 1951, (Act LXV of 1951), as inserted by section 13 of the Industries (Development and Regulation) Amendment Act, 1953 (Act XXVI of 1953).

20. The West Bengal Land Development and Planning Act, 1948 (West Bengal Act XXI of 1948), as amended by West Bengal Act XXIX of 1951".

The Constitution (Sixth Amendment) Act, 1956

2. In the Seventh Schedule to the Constitution,

(a) in the Union List, after entry 92, the following entry shall be inserted, namely:—

"92-A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce"; and

(b) in the State List, for entry 54, the following entry shall be substituted, namely:—

"54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I."

3. In article 269 of the Constitution,

(a) in clause (1), after sub-clause (f), the following sub-clause shall be inserted, namely:—

"(g) taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce"; and

(b) after clause (2), the following clause shall be inserted, namely:—

"(3) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce".

4. In article 286 of the Constitution,

(a) in clause (1) the Explanation shall be omitted;

(b) for clauses (2) and (3), the following clauses shall be substituted, namely:—

"(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in interstate trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify".

(d)

The Seventh Amendment Act, 1956

17. In part VIII of the Constitution,—

(a) for the heading "THE STATES IN PART C OF THE FIRST SCHEDULE", the heading "THE UNION TERRITORIES" shall be substituted; and

(b) for articles 239 and 240, the following articles shall be substituted, namely:—

239. (1) Save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.

(2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining union territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers.

18. After article 258 of the Constitution, the following article shall be inserted, namely :—

"258 A. Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends.

20. For article 298 of the Constitution, the following article shall be substituted, namely,

"298. The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose."

26. In the Seventh Schedule the entry 33 of the Union List and and entry 36 of the State List shall be omitted and for entry 42 of the Concurrent List, the following entry shall be substituted, namely :—

"42. Acquisition and requisition of property."

28. .... in entry 24 of the State List, for the word and figures 'entry 52', the words and figures 'entries 7 and 52' shall be substituted.

CHAPTER XVI

THE SUPREME COURT IN THE INDIAN CONSTITUTION

I

Judicial Review by the Supreme Court of the Acts of Congress has often been subjected to severe criticism in the United States.[1] The Presidents, the States and the Congress have sniped at it from time to time. Students of constitutional practice, as of constitutional law, have subjected its work to a microscopic examination; some of them have discovered that it neither lives up to its professions nor to its reputation. It has been attacked as an undemocratic device for checking the full efflorescence of popular wisdom. Its need even in a federal government has been questioned.[2] Its work as a bulwark of fundamental rights lodged in a written constitution has been belittled.

But the Court has survived all onslaughts. Despite all that could be said against it, countries adopting new constitutions have set up similar institutions.[3] Justice Holmes' opinion that the United States would not come to an end if the court lost the power of declaring Acts of Congress void,[4] was given before the federal government had started moving into the state fields through its grants, bounties and plans. Its most trenchant foreign critic, Prof. Brogan, has now discovered that it does serve some purpose, although an educative one.[5] Participants in two recent symposia on the place of the Supreme Court in the American polity generally agree in holding that it does perform some useful functions and should continue performing them.[6]

The Supreme Court's exercise of its power of judicial review has been sometimes attacked and defended on the same grounds. Whereas one group of writers finds it performing a very useful service in adopting a document written in the eighteenth century to the needs and problems of an ever evolving if not ever changing United States,[7] another would condemn it for its finding in the Constitution a grant of power today which it had denied the day

before yesterday if not yesterday.[8] The very concise if not cryptic nature of the American Constitution and the difficulty if not the impossibility of amending it have formed a standing temptation to the Court to add its own contribution to the American polity and discover powers, immunities, instrumentalities and ancillary authority which were not always easily found in the Constitution. Once imported into the Constitution, the Court was reluctant to declare them redundant, much less obnoxious. But it redounds to the credit of the Court that it has not usually been too slow to read out of the Constitution authority which it had read into it.

Some jurists are beginning to feel that in the technological age in which we are entering, a written Constitution and a Court with power to declare even the Acts of the national legislature unconstitutional, where they offend against its provisions, may probably form a more effective guardian for the preservation of the worth of the individual to the State against the attacks both of the technocrats and administrators.[9]

In discharging its function of judicial review of legislation, it must be admitted, the Supreme Court forms "a deliberate check upon democracy through an organ of government not subject to popular will." But it has been claimed that "the judges of the Supreme Court are, in a sense, the embodiment of the reason of the body politic empowered to act as the guardians and final interpreters of the fundamental laws, by the original and supreme will of the people which created them."[10] As such, it has been said, judicial review involves an appeal to reason against will, an appeal to the people sober from the people drunk.[11] When the Court holds an Act unconstitutional, it may place no more than a temporary check on the legislature. But it may provide a cooling-off period when second thoughts may have time to take the field. In doing so, it asserts that the rule of the majority is itself subject to law. It is only when the majority presumes to offend against the higher law, the Constitution, that the Supreme Court bars its way. But its danger signal may block only one of the ways of achieving the legislative end if it be constitutional. The legislature may try to get round the constitutional objection,[12] though it may not always succeed.[13] If the end be not constitutional at the time the Court

gave its verdict, a constitutional amendment may try to provide the proper setting for achieving the end in view.[14] But whereas the Court may not rule out a legislative policy for all time, it may kill an "obnoxious" measure for the time being. Its vigorous though judicious onslaught on the policy embodied in an Act may make it impossible to enforce it.

II

The Supreme Court in India has been functioning for eight years now. This may be a short period by which to judge an institution. But unlike the Supreme Court in the United States,[15] the Supreme Court in India started functioning with judicial review securely thrust upon it. This period was more likely to reveal serious conflicts between the government and the judiciary than any other period in the life of the Court and the Government. India's rulers are new to the job and having been so long in opposition bring a burning zeal and enthusiasm to its discharge. The judges were, however, bred in the old tradition of the judiciary and could be naturally expected to look askance on persons in high places. Few of the judges have been avowed Congressmen. They do not possess the civil servants' compelling virtue of faithfulness to the powers that be. They did not need the self-effacement which a civil servant was expected to practise.

It is surprising to find that these eight years have provided only a few occasions of serious clash. It is true the Supreme Court has thwarted occasionally the policy which a State Government or the Central Government had very enthusiastically espoused. We should, however, make a distinction here between the attempt of the Supreme Court to impose a rule of law on the administration and its declaring government legislation or administrative action invalid otherwise.

III

Here, at the outset, let us emphasise the fact that it was with the coming into force of the Constitution in 1950 that it was proclaimed aloud for the first time that the law applies to the government as well as to the governed. It is not surprising, therefore, that in order

to impose the rule of law, the Supreme Court had to cast its net far and wide. If in Madhya Pradesh it restrained a District Magistrate from preventing labour from seeking employment in the manufacture of Bidis during the agricultural season,[16] it rebuked the Government of Madras when it tried to compel the Cinema licensees to exhibit not less than 2,000 ft. of one or more approved films at every show.[17] It told the Government of U.P. that it could neither extend the time for making an industrial award nor specify a fresh period of time for making thereof after the period fixed in the original order had expired.[18] It similarly prevented the U.P. Government from taxing forward contracts as sales.[19] It brushed aside the claim of the same government to prohibit dealings in futures and options in the commodities other than food grains under the U.P. Food Grains Order.[20]

It dealt equally strongly with legislation passed in Hyderabad settling a dispute about succession between private persons by legislation rather than by recourse to the law courts[21] and Bihar legislation which tried to settle alleged agitaion in a locality by taking away land previously held lawfully by a citizen.[22]

Where specified public officials had been empowered to deal with matters in their discretion, the Supreme Court insisted that they exercise their own discretion rather than decide cases in pursuance of government policy conveyed to them in writing or otherwise.[23]

It prevented the Court of Wards, Ajmer from taking over estate of a landlord who was, in their opinion, not habitually fair in his dealings with the tenants.[24] It censured the arbitrary Act of the Government of Assam in cancelling the lease of fisheries recommended by the local Deputy Commissioner and approved by the State,[25] thus foiling its attempt at playing the part of a "brave, bold despot which knows no law."[26] If in Mysore, it could not re-award a contract for selling liquor for the year 1953-54 to the original allottee to whom it had been validly granted because the appeal reached it only a fortnight before the contract for the year was about to expire,[27] it did make a declaration that the contract had been validly assigned to him. It held the Government of Bihar to the terms of its agreement and allowed the Gaya Electric Under-

taking to have its right adjudicated in courts under the agreement.[28] It examined the U. P. Coal Order 1953 and found unreasonable the power granted to the Coal Controller to issue licences in his discretion for stocking, selling, storing, disposing or utilising coal as he had been given absolute power to grant, renew, refuse, suspend, revoke, cancel or modify a licence.[29] It similarly struck down the right of the Food Grains Authority in Rajasthan to acquire food-stocks at any price.[30] It prevented the Government of Rajasthan from enforcing an Ordinance of the United States of Rajasthan vesting the right of collecting the revenue in jagirs in the State in areas which had formerly formed the United States of Rajasthan. The Ordinance did not apply to all the territories which were now included in the State of Rajasthan.[31]

When the Government of the U. P. was found to have placed in 1947 the management of Lallamal Hardeodas Cotton Mill under a Controller nominated by it and working under the general supervision of the local District Magistrate, the Supreme Court held that the order became void as soon as the Constitution came into force on January 26, 1950.[32]

Even when the President threw his protective mantle over the Madras Electricity Supply Undertaking (Acquisition Act) 1949, certifying that its constitutionality could not be called into question even if it infringed the right guaranteed under clause (2) of article 32 of the Constitution or limits placed on governmental authority by section 299 (2) of the Government of India Act 1935, the Supreme Court struck down the Act as beyond the competence of the Madras legislature as defined in other provisions of the Government of India Act, 1935.[33] It held illegal the right claimed by the Government of Madras—or for that matter by any other government—to interfere with the free circulation of a newspaper.[34]

Even when the First Amendment to the Constitution Act allowed reasonable restrictions to be placed on freedom of expression in the interest of public order, it held invalid the order of the government of the Punjab banning apparently for ever the entry of a newspaper from Delhi into Punjab.[35]

It disallowed pre-censorship of newspapers[36], though after the passage of the First Amendment, it held valid the orders of the

Government of Punjab prohibiting the publication of news about Hindi agitation in a certain newspaper for a short period.[37] It struck at the right claimed by the Madras Government to declare associations unlawful without giving them any reasonable chance to contest such an order.[38] It insisted on keeping the Bengal Government to its agreement with the landlords in the matter of sale of land for non-payment of land revenue and permitted it to do so only after the date specified in the agreements and not as laid down unilaterally by the Board of Revenue.[39] It released a prisoner taken from Bombay to Lucknow to be produced before the Speaker of the U. P. Legislative Assembly when he was not produced before a magistrate within 24 hours.[40] It granted the Habeas Corpus petition of Ram Singh and others in Delhi when they were kept in jail without being properly remanded thereto by the magistrate.[41]

It held illegal the delegation by the Chief Commissioner, Ajmer, of the authority vested in him to make rules for holding fairs.[42] It resisted the attempt of the Government of U. P. to resume the lands granted to a citizen in 1948 by the ruler.[43] It prevented the illegal seizure of goods by police officers in Himachal Pradesh at the instance of Government of Jammu and Kashmir without the authority of law.[44] It restored to the Government of Bengal the right to levy sales-tax on goods bought by Department of Industries and Supplies (The Ministry of Industry and Supplies) which it had earlier surrendered in favour of the Indian Stores Department or the Supply Department, as the scope and volume of the work entrusted to the new Department was much wider and larger than that of the departments which the Ministry had replaced.[45]

A rather ticklish question arose when an order purported to be made by the Governor and signed by the Home Secretary came before the Court. How was such an order to be proved? The Supreme Court did not dismiss the possibility of the relative minister being asked to file an affidavit or called to Court. Of course, the secretary with requisite knowledge may file an affidavit and if his affidavit is believed, the minister need not be called. But it held that a slipshod verification saying that everything was true to the best of his information and belief might well, in a given case, lead to a rejection of the Secretary's affidavit.[46]

No authority was too small for the Supreme Court's intervention. When the Town Area Committee of Jalalabad levied an unreasonable fee equivalent to a tax, it held it illegal.[47] It prevented the Municipal Board, Kairana from setting up a Municipal Market where alone vegetables were to be sold whereas the by-laws laid down that vegetables could only be sold at a licensed place. The municipality had made no by-laws for licensing markets.[48] It held that the Industrial Disputes Acts applied to municipal workers including the head clerks, and the sanitary inspectors.[49] It restrained a municipal board from removing its secretary before the lapse of a month of the notice period.[50] It held that an accused from another State could not be tried by a Panchayat under the U. P. Gram Panchayats Acts, 1947.[51] It prevented the Central Board of Revenue from transferring the assessment proceeding of a corporation to a place obviously inconvenient to it.[52] It awarded the arrears of salary to the heirs and legal representatives of the Secretary, District Board, Shahajahanpur who had been wrongfully suspended pending the decision of his appeal against an order of dismissal passed against him.[53]

These were merely matters of keeping the government straight. The Court emphasised the principle that no organ of State may render decision which did not conform to a general rule previously stated. Even though most of its orders concerning administrative matters were passed by the Supreme Court reversing the decisions of the lower courts, tribunals or authorities, it may be argued that a part of this work may have been done by another court. So far as orders involving the constitutionality of Acts were concerned it is obvious that they lie entirely within the sphere of the Supreme Court.

IV

The clash between the Supreme Court and the Central or State Governments during this period centred around about half a dozen important problems. Herein the policy of the government rather than the execution of its laws was concerned. Two of these cases arose in Bombay; one concerning prohibition, the other concerning the educational policy of the Government. The Bombay Prohibi-

tion Act survived the scrutiny of the Supreme Court so far as the classes to whom the Act was not to apply were concerned. It ruled however that in prohibiting the possession of medicinal preparations or toilet articles containing alcohol, the legislature had stepped beyond its proper sphere. Possession of such toilet articles or medicinal preparations could under no circumstances be made criminal.[54] The prohibition policy was not indicted but the zeal and enthusiasm of the Bombay Government which had made it attack medicinal preparations and toilet articles were curbed. This, however, turned out to be a pyrrhic victory. The use of medicinal preparations had not been prohibited. In Behram Khurshed Pesikaka v. State of Bombay, the Supreme Court placed the burden of proving that a suspected person had consumed prohibited liquor rather than permissible medicinal preparation squarely on the shoulders of the prosecution.[55] This certainly made the successful prosecution in cases involving taking prohibited drinks more difficult.

The Bombay Government was sharply brought up against the hard realities of the Constitution, in another matter of policy. It decided to make the regional languages media of instruction, in its schools. There was nothing new in it. It was rather late in this field. Elsewhere, however, English had sometimes been continued as the medium of instruction securing the adoption of regional language apparently by voluntary action. Bombay tried to make up for its being late in the field by adopting a more comprehensive and stringent policy. It laid down that to be eligible for grants, schools except those teaching children whose mother tongue was English, *e.g.*, Anglo-Indians, must not teach their students through the medium of English. This brought its policy into conflict with the requirements of the Constitution. The Bombay Government demanded that none but those whose mother tongue was English be taught through the medium of English. The Constitution however demanded that grants on a more liberal scale would be paid to the Anglo-Indian Schools up till 1960 only if they would admit children of other classes to their institutions. The Supreme Court held that the State Government could not prohibit a course of action which the Constitution approved. It struck down the Bombay

circular by holding that however laudable its object of making regional languages the media of instruction in its schools, it could not differentiate between its citizens for reasons relating to difference in language alone.[56]

It may be conceded here that the decision of the Supreme Court touched a very small fraction of the students intended to be covered by the new educational policy of the Bombay Government.

The attempt of the Governments of Madras, Bombay and Orissa to supervise and control the income from religious endowments and Maths was practically paralysed by the decisions of the Supreme Court characterising certain features of the impugned legislation as implying interference with the religious rights of citizens and others as interfering with the property rights of the Mahants. It found some of the provisions defective otherwise as taking away existing rights of citizens without affording proper opportunity of defending them.[57]

The Government of Madras was deservedly rebuked by the Supreme Court for its continuing to act as in the pre-Constitution days. Seats in its educational institutions had been divided by a government resolution between various communities. Posts in its public services were also similarly divided. On this being challenged, the Supreme Court found no difficulty in holding that such divisions, based on birth were against the Constitution and therefore void.[58]

In case involving the same question in U. P., some voters went to the Supreme Court after taking part in a municipal election where seats had been divided among communities. The Supreme Court pronounced such communal representation unconstitutional and void, though in the case in court it refused to grant any relief in the form in which it had been asked for because the election was over.[59]

The State of Bihar ran into trouble with regard to the implementation of its land policy. Its land Reforms Act, 1950, sought to acquire arrears of rent and cesses. The Supreme Court held such acquisition neither in the public interest nor related to the objects of the legislation.[60] Holding these provisions of the Bihar Land Reforms Act "a piece of colourable legislation," the court struck

them down as unconstitutional, void and unenforceable.[61] Similarly it prevented the Government of Orissa from enforcing some of the provisions of the Orissa Agricultural Income-Tax (Amendment) Act, 1950, when, in the guise of a tax provision, it sought to acquire agricultural land without paying compensation.[62]

The Government of Madhya Pradesh was compelled to honour the licences to cut, gather and carry away produce of land in the shape of tendoo leaves, lac, timber or wood granted by the proprietors of land which the State had acquired.[63]

In Uttar Pradesh the attempt of the State to nationalise road transport was made ineffective by the Courts. The High Court of Allahabad held that the state could not do so by an executive order.[64] When the State passed the necessary legislation, the Supreme Court questioned whether it was in public interest to thus interfere with the right of citizens to follow a profession or engage in a business or trade.[65] When an amendment of the Constitution removed the challenge to such legislation by permitting the State to nationalise industries the Supreme Court held that this still left untouched the freedom of trade guaranteed to citizens and in any case it was a deprivation of property, for which the State must pay compensation.[66]

Several States were concerned in the decision of the Supreme Court with regard to taxes on sales or purchases made in the course of inter-State trade or commerce. A proviso to article 286 section 1 of the Constitution provided that sales would be deemed to take place in the State where goods were delivered for consumption in the State. The Supreme Court first held valid taxation by the State in which such goods were delivered for consumption.[67] Later the Supreme Court held that no State could levy tax on goods sold in the course of inter-State trade or commerce.[68] This affected almost all the States which had started levying taxes on out-of-State transactions saved to them by first decision of the Supreme Court.

West Bengal, Saurashtra and Bombay were affected by the decision of the Supreme Court with regard to special courts.[69] The draftsmen in all the three States had clothed their identical objectives in almost identical terms. Section (5) (1) of the West Bengal Special Courts Act was held *ultra vires* by reason of its provisions

being in conflict with article 14 of the Constitution. Among other things, it permitted the State Government to refer any case to a special Court—created by it by a notification vesting in the Court the right to try any case referred to it.[70] The Saurashtra State Public Safety Measures (Third Amendment) Ordinance of 1949 was saved because the notification issued under it had created Courts for trying offences, classes of cases, and not cases, even though authorised by the parent Act.[71] The Bombay Securities Measures Act of 1947 was held *ultra vires* and inoperative after the coming into force of the Constitution.[72] The Act authorised the State to set up Courts under Special judges to try any case referred to them.

The Union Government and most of the State Governments were affected by the decisions of the Supreme Court in connection with Preventive Detention. Here it may be asked whether any questions of policy were involved at all. When first the Supreme Court insisted that the Court must have a copy of the grounds of detention furnished to the accused so that it could decide whether or not the right conferred on the detenue by other sections of the Act to rebut the grounds had been allowed to be exercised,[73] it was removing a clash discovered between parts of the same Act. In specific cases, again, what the Supreme Court struck down was very often the carelessness of the officials framing the grounds or their delay in furnishing them.[74] That the Court had no intention of making the maintenance of law and order difficult was well illustrated by its holding legal the supplying of supplementary particulars.[75] It must however be conceded that its watchfulness for rights of citizens must have influenced the Government policy in many more cases than those which came to the Courts.

The Court assumed early in its career control over tribunals of various types, appointed by the State Government or by the Union Government.[76] One need not take seriously the fact that when the first such case came to the Court the Union Government resisted the claim of the Supreme Court to the exercise of such authority.[77] The Supreme Court extended its jurisdiction to include acts of administrative authorities likely to affect the subjects prejudicially if the authorising statute required the authority to act judicially.[78]

It also held its door open to provide relief to citizens threatened with penal consequences if they did not comply with provisions of legislation which they alleged were unconstitutional, and this even though other remedies were open to them under the challenged legislation.[79]

The decisions of the Supreme Court seriously challenged the right of the Union and the State Government to take possession of or regulate the use of property.[80] The Constitution had to be amended thrice[81] to permit the government to carry on the policy which it wanted to follow. It must be admitted that here again the Supreme Court struck down the incompatibility between the various provisions of the Constitution and the impugned legislation going beyond the field allotted to it by the Constitution. The Government therein read, not an attack on its policy, but its failure to clothe its ideals in the formal and technical language, so as to form a part of the Constitution.

A serious obstruction to the policy of the Union Government was occasioned by the decision of the Supreme Court holding the Taxation of Income (Investigation Commission) Act, 1947, invalid after January 26, 1950.[82] It must be remembered, however, that the commission was set up as a temporary emergency institution which should have been able to finish its work before the Constitution came into operation. The Act creating it had been framed on the assumption that the government had information about almost all the cases where evasion of taxation on a large scale had taken place during the war.[83]

When the Punjab Government launched proceedings against members of a procession under the Punjab Security of the State Act, 1953, the Supreme Court in appeal held that howsoever reprehensible the conduct of the appellants who had raised indecent, vulgar and provocative slogans against two ministers might have been, prosecution under the Act could only succeed if it was established that it had offended against decency or morality. It deprecated strongly the attempts of the State authorities in prosecuting the accused under the Security of the State Act and acquitted them.[84]

The Supreme Court may occasionally reshape an Act so as to

make it conform to the provisions of the Constitution. This may involve putting a "shall" where there was originally only a "may" in the legislation. On other occasions it may cut out part of an Act, because it is void and hence dead and of no effect. Notwithstanding all this, the justices may well believe that amending Acts of the legislature is no part of their functions. This protestation may save them from being looked upon as rivals by the legislatures in their most important function, making, unmaking, or amending of laws.

V

Normally the executives and the legislatures have been content to follow where the courts have led.[85] But Parliament has occasionally felt it necessary to amend the Constitution so as to make Parliament perform, to the satisfaction of the court, a function which Parliament may have earlier considered the Constitution allowed it to perform.[86]

Through its judicial control of inferior Courts the Supreme Court has laid down what it would consider a fair trial and a fair investigation in a criminal case, thus influencing the ways these things may be done to its satisfaction.[87]

India prides itself on being a welfare State. The Constitution which created the Supreme Court clothed the executive and the legislature—implicitly if not always explicitly—with power to run such a State. The Constitution specifically gives the Supreme Court the right of judicial supervision over all tribunals. The Constitution has thus explicitly rejected both the theses that all power is evil and that administrative tribunals may function independently and without judicial review. Naturally the court has followed the Constitution in looking upon this controlled power as a necessary adjunct to the service of government and administration. It has, by its decisions and by reasons given in support of those decisions, enlarged the area to which the rule of law should be applicable. By asserting judicial control over Election Disputes Tribunals,[88] the Supreme Court has secured that the process of creating the political power in the country functions regularly and in an orderly manner.

The Supreme Court has tried to protect the minorities, cultural, linguistic, and even territorial, in the exercise of the rights guaranteed

to them within the framework of the Constitution, by carefully analysing the issues raised in cases before it.[89] The fundamental rights of individuals and citizens in the Constitution luckily have not been granted absolutely. The Constitution itself provides that restrictions may be placed on several of them under specified conditions or to serve specified ends. The Court has, however, always proceeded on the assumption that it is the rights that are fundamental and not the restrictions. It has conceded that power may be necessary to clothe these rights with vitality, if they are to be enjoyed by the community at large.

As an analysis of the amendments to the Constitution has amply demonstrated,[90] we are as yet in no danger of equating the unconstitutional with the undesirable or unjust. This may not strictly be tantamount to not equating the constitutional with the just or desirable. But the Supreme Court has contributed significantly to the second development as well. It has gone off the beaten track now and then, to think aloud and in such an unorthodox way proclaimed that the legal limits to a course of action need not be the only limits thereto.[91] The Parliamentary form of India's Government allows the question hour in the legislatures to be used for ventilating grievances without making them always "stuff of law suits" and thus keeps alive the tradition that what is permitted by law need not always be in public interest.

Judicial review of legislation, it has been claimed, makes it possible to adopt the Constitution to the varying needs of the day. This may involve reversing earlier decisions of the court. Where amendment of the Constitution is difficult, this function may be claimed to be performed by the Court to some purpose. Students of jurisprudence and constitutional law are sometimes distressed over the combination of paying lip service to the principle of *stare decisis* with the power of reversing decisions, as exercised in the United States and India. The Australian Court frankly reverses earlier decisions when they do not seem to suit the circumstances. The Indian adoption of the American insistence on having the best of both the worlds has been no more successful than its American model.[92] It may of course be objected that the Australian practice may sometimes be as much, if not more, objectionable. It knocks

the bottom out of the entire case for judicial review when, as in the Engineers' case,[93] the Australian High Court reversed an earlier decision, and conceded that the federal government could exercise a power which the electorate had denied to it a little earlier in its attempt at amending the Constitution. Under such circumstances, the Court cannot claim to represent the reason of the polity as against its will. It no longer represents a check, deliberate or otherwise, upon democracy, nor does it provide an appeal from the people drunk to the people sober. It is difficult to argue that the lip service paid to precedents, in the guise of distinguishing one case from another, is always of much help or guidance to those who find a new version of law applicable to them, on grounds which they learn after hearing the decision in their case announced.

The study of the cases decided by the Supreme Court leaves one very often in no doubt that it was failure of either the lawyers in Courts below or in the Supreme Court itself which led to a subsequent change in the decision of the court.[94] The detailed provisions of our Constitution do not at present need to be interpreted away. It is hoped that as lawyers learn their business better and as the court gives up relying on the idle formula, "assuming, without deciding," the Court would be able to strike a new line for itself and interpret the Constitution as it stands.

A study of the judgments of the Court would demonstrate that most of them are inspired with a desire to secure that injustice is neither perpetrated nor perpetuated. In securing that justice is done, the Supreme Court is usually able to cut through technicalities, however time honoured. It has made, however, no attempt at substituting its own view of a matter for that of the legislature whose handiwork it may have been examining. As a court it is not concerned with the wisdom or the expediency of the law it is examining. But it has allowed itself the luxury of asides, and off-the-record comments,[95] in which most Courts of such high status do not usually indulge. However irritating some of these remarks may be to some professional lawyers, the legislative and administrative record for the past eight years amply bears out the useful purpose they have served. They have never interfered with the impartial interpretation by the Court of the law in the case in Court,

yet very often they have found their target in some administrative or legislative shortcoming.

If the published opinions of the Court can serve as a pointer, some judges seem to have developed the knack of converting their colleagues to their own point of view.[96] It is good that outsiders have no access to the conferences that the judges hold in coming to a decision. Otherwise what would one not have heard? Or are the justices less pungent in their conferences than in their written judgments?

Chief Justice Taft was once roused to declare that the Supreme Court of the U. S. A. was a blind Court, failing to see what was visible to everyone else. The Indian Supreme Court has not yet developed any blind spots. The disease in the United States owed its origins to the Courts writing *laisser-faire* into the Constitution while interpreting due process. The Indian judges have had no such temptation so far. The Court was indeed invited to do so when land legislation in various States was attacked as not being in the public interest. It refused to swallow the bait even though, in one case at least, it was offered by the Chairman of the Drafting Committee of the Constituent Assembly arguing a case in court.

In India as elsewhere, "a society has always within it seeds of dissension." But "it also has within it forces making for moderation and mutual accommodation." Prof. Hart would have us believe that "the Courts"—and possibly the Supreme Court particularly—"have a significant contribution to make in pushing the American Society in the direction of moderation in combination with other forces."[97] The Supreme Court in India has certainly made significant contribution to pushing the Indian Society in the direction of moderation. It has, as occasion demanded, prevented "the intolerable sacrifice of decent and trustworthy modes on the altar of expediency!"

The Supreme Court in India has tried to make the spirit of law pervade throughout the governmental process. Herein it had its toughest assignment. It had to blow hard, if not hammer hard, at the despotism that stalked throughout the country. Most parts of Princely India had never really enjoyed the rule of law in any shape or form. In what had been British India till recently remnants

of despotism flourished openly. Between August 15, 1947, and January 26, 1950, the attention of the country was mostly directed to the fashioning of a Constitution. The social moves were not always favourable to the rule of law. The new government that came into power at the centre and in the popularly governed States had won power the hard way. The majority party was flushed with the pride of victory. Under the circumstances, the Supreme Court was almost the only effective instrument, barring the Constitution, for imposing a rule of law on the country. The Constitution and the Supreme Court between them have done a spendid job in infusing the spirit of constitutionalism in the country despite heavy odds. There has been certainly some straining at the restraints occasionally. The Court has had to resolve several tensions in the constitutional system, here confining a state government to its governmental duties leaving administration to the administrators, there telling the administrators where they must get off the field not open to them, now telling the landlords that it was not in public interest to perpetuate feudalistic conditions of landholding and again warning governments that they could not, even with the help of legislative forms, usurp the functions of the judiciary. "The standards of what is fair and just" set by the Supreme Court have certainly "promoted the spirit of law throughout the government" and "helped shape the dominant civic habits and attitudes" "by releasing through their judgments contagious consequences."

In an American seminar on Government under law, a federal judge was asked, "what part, if any, do public opinion and public clamour, whipped up by the press out of all proportion to the issues involved, play in arriving at your and your associates' almost always calm and well reasoned opinion? What part does the atmosphere of the general community play?" Judge Hastie's answer was very illuminating. "As little part as judges, being human beings, can let it play. We like to believe that it plays almost no part. That certainly is our goal."[98] The restraint on the press and the public with regard to cases under trial is much more rigorous here than in the United States. If the judges of the Supreme Court were asked the same question, one is sure they would be able to assure their interrogator of their serenity, impartiality and clear headedness.

NOTES

1 Cf. Bryce, *The American Commonwealth ;* Brogan, *The American Political System ;* Crosskey, *Politics and the Constitution in the History of the United States ;* Corwin, *Court over Constitution ;* Swisher, *The Growth of Constitutional Power in the United States ;* Beard, *The Republic,* pp. 223-241; Hughes, *The Supreme Court of the United States.*

2 Brogan, *An Introduction to American Politics,* p. 36.

3 Cf. Loewenstein, *Constitutionalism and Constitutional Trends since World War II.*

4 Holmes, *Collected Legal Papers,* pp. 295-296.

5 Brogan, *Introduction to American Politics,* p. 415.

6 Cahn (Editor) *Supreme Court and Supreme Law* ; Sutherland (Editor) ; *Government Under Law.* Cf. However, the statements in Appendix I to this Chapter for the American attitude towards the Supreme Court just now.

7 Cf. *Government Under Law* op. cit., *The Supreme Court in the United States History* by Charles Warren, *The Supreme Court and the Constitution* by Robert Cushman.

8 Cf. *Government Under Law* op. cit., *Nine Men* by Fred Roddal, *Our Expendible Constitution* by Corwin and *Vagaries and Varieties in Constitutional Interpretation* by Thomas Reed Powell.

9 *Government under Law in Post-War England* by Sir Raymond Evershed in *Government under Law* op. cit. 161.

10 Prof. Joseph Snee in *The Supreme Court and the Supreme Law,* op. cit. 127. Cf. *Lions under the Throne,* Curtis; *On Understanding The Supreme Court,* Freund; *The Supreme Court and the National Will,* Alfange.

11 *The Supreme Court and the Supreme Law,* 126.

12 The Congress passed an amended definition of the Estate tax the very day the Supreme Court held its levy unconstitutional under the existing statute. Parliament in India added an Explanation to section 5 (7A) of the Indian Income-Tax Amendment Act 1940 after the Supreme Court had held that only current assessment proceedings could be validly transferred from one assessment circle to another.

13 Cf. above, Chapter XIV, Supreme Court and Parliament.

14 Cf. above, Chapter XV, Supreme Court and Amendments to the Constitution.

15 Cf. *An Economic Interpretation of the Constitution,* Charles Beard; *The Doctrine of Judicial Review,* Edward S. Corwin; *The Court over the Constitution,* E. S. Corwin; *Government by Judiciary,* Boudin.

16 Chintaman Rao v. The State of Madhya Pradesh, 1950 S.C.R. 759.

17 R. M. Seshadri v. District Magistrate, Tanjore, 1955 I S.C.R. 686.

18 Strawboard Manufacturing Co., Ltd. v. Gutta Mill Workers' Union. 1953 S.C.R. 439.

19 Sales Tax Officer, Pilibhit v. Budh Pradash Jai Prakash, 1951 I S.C.R. 243.

20 Chamber of Commerce Hapur and Three Others v. The State of U.P., 1955 I S.C.R. 838.

21 Ameerunnissa Begum and Others v. Mahaboob Begum and others, 1953 S.C.R. 404.
22 Ram Prasad Narayan Sahi and another v. The State of Bihar and others, 1953 S.C.R. 1129.
23 State of Bombay v. Purshottam Jog Naik, 1952 S.C.R. 676.
24 Thakur Raghbir Singh v. The Court of Wards Ajmer and another, 1954 S.C.R. 1049.
25 State of Assam v. Keshab Prasad Singh and another, 1953 S.C.R. 865.
26 Ibid at 876.
Cf. however, Ganga Ram v. Thezpur Kaibarta Fisheries Co-operative Society and others, 1955 S.C.R. 437, where the Supreme Court held that the Government could cancel a lease for causes shown and re-award it on its own.
27 K. N. Guruswamy v. The State of Mysore, 1955 I S.C.R. 305.
28 Gaya Electric Supply Co., Ltd. v. State of Bihar, 1953 S.C.R. 572.
29 Messrs. Dwarak Prasad Laxmi Narain v. State of U.P., 1954 S.C.R. 803.
30 State of Rajasthan v. Nath Mal, 1954 S.C.R. 982.
31 State of Rajasthan v. Rao Manohar Singhji, 1954 S.C. 996.
32 Shanti Sarup v. Union of India, A.I.R. 1955 S.C. 624.
33 R. E. S. Corporation v. State of Andhra, 1954 S.C.R. 251.
34 Ramesh Thapper v. The State of Delhi, 1950 S.C.R. 594.
35 Narendra v. State of Punjab, A.I.R. 1957 S.C. 639.
36 Brij Bhushan and Another v. The State of Delhi, 1950 S.C.R. 905.
37 Narendra v. State of Punjab, A.I.R. 1957 S.C. 869.
38 State of Madras v. V. G. Rao, 1952 S C.R. 597.
39 Kali Ram Dokania v. Ulfat Hossain, A.I.R. 1954 S.C. 1.
40 Gunupati Keshavaram v. Nafisul Hassan, A.I.R. 1954 S.C. 636.
41 Ram Singh v. The State of Delhi and Another, 1951 S.C. 1.
42 Captain Ganapati Singhji v. The State of Ajmer and another, 1955 S.C.R. 1065.
43 Raja Surya Pal Singh v. The State of U.P. and another, 1952 S.C.R. 1056.
44 Wazir Chand v. The State of Himachal Pradesh, 1955 I S.C.R. 408.
45 Union of India v. Commercial Tax Officer, A.I.R. 1956 S.C. 206.
46 State of Bombay v. Purushottam Jog Naik, 1952 S.C.R. 674.
47 Mohammad Yasin v. The Town Area Committee Jalalabad and another, 1952 S.C.R. 572.
48 Rashid Ahmed v. Municipal Board, Kairana, 1950 S.C.R. 566.
49 D. N. Banerji v. P. R. Mukherjee and another, 1953 S.C.R. 302. Baroda Borough Municipality v. Its Workmen and others, A.I.R., 1957 S.C. 110.
Cf. however, Workers D.T.E. v. Management D.T.E., where it was held that a doctor in a tea estate was not a workman.
50 Shrimati Hira Devi v. District Board Shahajahanpur, 1952 S.C.R. 1122.
51 Bhim Sen v. The State of U.P., 1955 I S.C.R. 1444.
52 Bidi Supply Co. v. The Union of India and Others, 1956 S.C.R. 267.
53 Shrimati Hira Devi v. District Board Shahajahanpur, 1952 S.C.R. 1122.
54 State of Bombay, v. F. N. Bulsara, 1951 S.C.R. 682.

55 Behram Khurshed Pesikaka v. The State of Bombay, 1955 I S.C.R. 613.

56 State of Bombay v. Bombay Education Society, 1955 I S.C.R. 568.

57 Commissioner, Hindu Religious Endowments v. Laxmindra Tirth Swamiar, 1954 S.C.R. 1005; Patilal Panchand Gandhi v. State of Bombay, 1954, S.C.R. 105; Sri Jagannath v. State of Orissa, 1954 S.C.R. 1046. The three governments however brought the provision of the Acts declared invalid within the requirements of the Constitution by suitable amendments which survived the scrutiny of the Supreme Court.

58 State of Madras v. Shrimati Champakam Dorirajan, 1951 S.C.R. 225 Venkataraman v. State of Madras, A.I.R. 1951 S.C. 229.

59 Nain Sukh Das and another v. The State of Uttar Pradesh and others, 1953 S.C.R. 1148.

60 The State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and others, 1952 S.C.R. 889.

61 Ibid., 948.

62 K. C. Gajapati Narayan Deo v. State of Orissa, 1954 S.C.R. 1.

63 Vishweshwar Rao v. The State of Madhya Pradesh, 1952 S.C.R. 1020.
In Smt. Shantibai v. State of Bombay and others (A.I.R. 1958 S.C. 532) An apparently similar grant by a landlord to his wife was held unenforceable against the State which had taken over his forests.

64 The judgment and order dated the November 17, 1953 of the High Court of Judicature at Allahabad. Civil Miscellaneous Writ No. 414 of 1953.

65 Saghir Ahmed v. State of U.P., 1955 I S.C.R. 715.

66 Ibid., 730.
Cf. above, Chapter XV, The Supreme Court and Amendments to the Constitution, the Fourth Amendment to the Constitution Act.

67 State of Bombay v. United Motors, 1953 S.C.R. 1069; Himatalal Harilal Mehta v. The State of Madhya Pradesh, 1954 S.C.R. 1122; State of Travancore Cochin v. S. V. Cashew Nuts Factory, 1954 S.C.R. 53.

68 Bengal Immunity Co., Ltd. v. State of Bihar and Others, 1955 II S.C.R. 603.

69 Cf. above Chapter XII, Stare Decisis and the Supreme Court.

70 The State of West Bengal v. Anwar Ali Sarkar, 1922 S.C.R. 435.

71 Kathi Raning Rawat v. The State of Saurashtra, 1952 S.C.R. 435.

72 Lachhamandas Kewalaram Ahuja and another v. The State of Bombay, 1952 S.C.R. 710.

73 A. K. Gopalan v. State of Madras, 1950 S.C.R. 88; Dr. Ram Krishnan Bharadwaj v. State of Delhi and others, 1953 S.C.R. 708.

74 Ujjar Singh v. State of Punjab, 1952 S.C.R. 756.

75 State of Bombay v. Atmaram Shridhar Vaidya, 1951 S.C.R. 167.

76 State of Bombay v. Parushottam Jog Naik, 1952 S.C.R. 674.

77 Bharat Bank Ltd. v. Employees of Bharat Bank Ltd., 1950 S.C.R. 459.

78 Province of Bombay v. K. S. Advani and Others, 1950 S.C.R. 621.

79 State of Bombay v. United Motors, 1953 S.C.R. 1069.

80 State of West Bengal v. Subodh Gopal Bose and Others, 1954 S.C.R. 587; Commissioner, Hindu Religious Endowments v. Laxmindra Tirth Swamiar, 1954 S.C.R. 1005; Dwarkadas Shrinivas of Bombay v. The Sholapur Spinning and Weaving Co., Ltd. and others, 1954 S.C.R. 672.

81 The Constitution (First Amendment) Act, 1951; The Constitution (Fourth Amendment) Act, 1955; The Constitution (Seventh Amendment) Act, 1956.
82 Suraj Mal Mohta and Co. v. A. V. Visvanatha Sastri, 1951 S.C.R. 448; Shri Meenakshi Mills Ltd., Madurai v. Vishwanath Sastri and another, 1955 I S.C.R. 787.
83 Taxation on Income (Investigation Commission) Act, 1947.
84 Kartar Singh and Others v. The State of Punjab, 1956 S.C.R. 476.
85 Cf. above Chapter XIV.
86 Cf. above Chapter XV.
87 Cf. above Chapter V, pp. 73 to 85.
88 Cf. above Chapter V, pp. 109 to 115.
89 Cf. above pp. 131 ff.
90 Cf. above Chapter XV.
91 Cf. above Chapter X The Supreme Court as a Critic.
92 See above Chapters XII and XIII.
93 Engineers' case, 28 C.L.R. 129.
94 Cf. above Chapter XII.
95 See above Chapter X.
96 Hart in *Government Under Law*, p. 140.
97 Hastie in *Government Under Law*, p. 360.
98 1954 S.C.R. 3.

APPENDIX I

THE SUPREME COURT IN THE UNITED STATES TO-DAY.

(1)

Supreme Court Assessed.

Criticism of our United States Supreme Court in the past few years cannot have escaped public attention. The Court has been severely castigated for some of its decisions affecting F. B. I. files, confessions by accused defendants and especially for its decisions limiting the investigatory powers of Congress.

It is no longer a professional secret that our Supreme Court necessarily decides some political questions under the guise of making a judicial decision between contending litigants. As the court's jurisdiction is narrowed to the more vital public questions arising through the courts, naturally the issues are sharper, the conflict more bitter and the defeated side more unhappy.

Some of the severest criticism of the court has come from the justices themselves, as the court's dissenting opinions amply indicate. The libertarian tendencies of some of the justices have shocked conservative lawyers and made wise laymen sometimes uneasy.

There are adequate remedies in our system when the Supreme Court goes wrong. These include constitutional amendment, legislation, judicial self-reversal and, if appropriate, impeachment.

Lawyers and laymen must recognize that no permanent reconciliation is possible between the principles of our representative popular government and the opposing principle of judicial supremacy; both are inextricably imbedded in our Constitution. The normal situation is therefore one of tension, a balance of power.

With all its faults, and whatever its defects, our Supreme Court is still the most trustworthy guardian of what we are proud to call our American way of life. We lack the perspective of history accurately to assess any of its current decisions. We should criticize in the spirit of helpfulness with the knowledge that the world has not yet produced a finer organ for translating abstract principles into constitutional commands.

Letter to the Editor in *New York Times* by
EUGENE C. GERHART.

(2)

The 'New' Supreme Court

It is true that the Court tends to divide itself into the appa-

rently inevitable classic pattern of three blocs, liberal, conservative, and middle-of-the-road.

There can be little doubt that Mr. Eisenhower has been startled by the turn the Supreme Court has taken. Although he has emphasized his deep respect for the Court's position in American life, he also has expressed misgivings. He recently said that he thought the Court might have gone "slower" on integration. Earlier, he had said there were some decisions that "each of us has very great trouble understanding". Within his Administration, the Justice Department has been frankly distressed by some of the Court's decisions affecting the prosecution of Communists.

"There has always been a pulling and hauling among the three branches of government. During the '30s there was a tendency for the Court to take more than its allotted third of power when it stood in the way of social legislation. Some feel that the Roosevelt Administration grabbed more than its share for the executive branch. During this Administration, Congress has tried to rectify the balance and in some areas has overdone it . . .

"Now comes a Court which is once more trying to restore the balance. It seems to feel that Congress has taken more than its share of power and the executive branch not enough. It is in this tripartite struggle that the present Court differs from its predecessors."

A different, and far more critical, appraisal of the Court's role was made by one of the nation's most respected jurists, retired Federal Judge Learned Hand, in a series of lectures that he delivered at Harvard earlier this year. When the Court strikes down a law, Judge Hand said, because it does not 'commend itself to the Court's notion of justice', then the Court is usurping the function of the legislative branch and becomes, in effect, "a third legislative chamber."

But the sharpest criticism that the Court has received from American jurists came at the Conference of State Chief Justices in California last August. There an overwhelming majority 36 to 8 voted for a resolution charging that the Court "often has tended to adopt the role of policy-maker without proper judicial restraint." Such criticism of the highest tribunal by the nation's top state judges was without precedent, and it was a hard blow at the Court's battered prestige.

When Congress reconvenes in January, conservative law-makers in both houses are prepared to introduce new legislation to curb the Court's powers. The Constitution does specify the power of Congress to limit the Supreme Court's appellate jurisdiction. Among the proposals due to be submitted at the next session are one to curtail the jurisdiction of the Court in cases of contempt of Congress, and one permitting the states to enforce their own laws on sedition without the cases being subject to review by the Supreme Court.

The present Court cannot afford to ignore public opinion, and its reflection in Congress, at the risk of having its powers cut and the balance of power in government upset.

From the *Newsweek* of 20 October 1958.

APPENDIX II

SOME RECENT TENDENCIES IN JUDICIAL REVIEW IN INDIA

Ever since the Supreme Court reversed itself in Bengal Immunity Co. v. State of Bihar,[1] the Court has seemed to be hospitable to cases in which the appellants in one form or another sought to make the Court reverse its earlier decisions.[2] Of course, ingenious lawyers had even before been trying to persuade it to reverse its decisions by distinguishing the case in Court from what had been decided earlier. Occasionally some High Courts also had similarly tried to get over the interpretation of the Constitution or of the law laid down by the Supreme Court. Once or twice it had had to admonish a High Court for its hair-splitting when it tried to place a case in a category different from the one covered by the ruling of the Supreme Court. But the success of the Bengal Immunity Co. by a narrow majority of 4 to 3 seems to have encouraged both the rich litigants as well as the High Courts in seeking,—in one form or another, revision of the Court's interpretation of the Constitution or of the law.

Along with this tendency has emerged another. As the Supreme Court has been entertaining appeals for arguments on questions which had been decided earlier, even when it affirmed its earlier decision, it has not always been content with resting its opinion on the earlier judgments; it has thought it fit to argue the question at length *ab initio* thereby lending colour to the hopes of litigants and lawyers that no question stays decided as it was.

These two tendencies have resulted in several interpretation of the Constitution or of law being reversed during the last two years or so. Sometimes—as in Bengal Immunity v. The Union of India[3] or Ganga Ram Das v. The Tezpur Kaibarta Fisheries Co-operative Society v. others[4]— there has been a straight reversal of an earlier decision. Occasionally, as in Bhikaji Narain Dhakras and others v. The State of M.P.[5], the earlier practice of suggesting that the particular argument which proves decisive in the instant case had not been raised earlier—in Saghir Ahmad v. U.P.[6]—has been resorted to. In some cases—as in Justice Jaganadha Das's judgment in Amar Singh v. The Custodian of Evacuee Property[7]—rather surprisingly, it has been claimed by the Justice writing the new judgment of the Court that one or more reason in support of the judgment then advanced—as for example his own definition of property as a bundle of rights in West Bengal v. Subodh Gopal Bose—represented the opinion of the Justice who wrote the judgment and was not shared by other members of the Court. It is difficult to determine how far such an assertion correctly reflects

the facts of the case. The assertion may be made—as here—by one of the judges who was a member of the Court that decided the case. He may be speaking for himself. Even then it is difficult to accept such a statement as relating to other participating justices some of whom may have retired or, even though on the Court, may not be members of the particular bench that decided the instant case.

Following a practice of the Supreme Court in the United States, the Supreme Court started early in its history not only to allow new questions of law to be raised but sometimes permitted questions of facts to be reopened before it. Sometimes, as in Kathi Raning Rawat v. The State of Saurashtra,[9] an affidavit—of an Under Secretary, Saurashtra Government in the instant case—had been allowed to be filed. Occasionally, as in Dwarakadas Srinivasa v. Sholapur Spinning Mill,[10] the old board of directors which had been superseded by Government nominees, the defendants in the case, had been allowed to join in an appeal even though they had neglected to do so at an earlier stage. But recently, though occasionally, a purely new point of law as in State of Bihar v. Ram Naresh Panday[11] was allowed to be raised though Manak Lal v. Prem Nath Singhvi[12] was decided on the plea that the point of law raised by the appellant was raised too late in the Supreme Court. All this lodges a discretion in the Court which puts heavy responsibilities on its members. When a request to put in new evidence by the appellant or the respondent is turned down—as in Manbodhan Das v. the State of U.P.[13]—and the judgment seemed to turn on the absence of the particular piece of evidence which one of the parties was ready enough to produce at this stage, the decisions of the Supreme Court become of doubtful value. One is left to guess what would have been the judgment of the Court if the additional evidence had been admitted. This is all the more regrettable in cases where the Supreme Court either openly reversed an earlier judgment or distinguished its decision in the instant case from an earlier decision.

A rather curious incident may not deserve to be raised to the status of a tendency though it is necessary to notice it. In Messrs Associated Tubewells Ltd. v. R. B. Gujarmal Modi,[14] the Supreme Court accepted for review its earlier refusal to grant special leave to appeal. It was alleged here that one or more judges of the Supreme Court had not been patient enough with the advocate at bar, the advocate had not been fully heard and had thus been denied adequate opportunity of saying what he had to say. Even though the review application was dismissed, one wonders whether it was the right course to go to the length of entertaining a review application and hearing the advocate at bar at length, not in the review, but on the original application, in order to impress upon the bar the following elementary principle of arguments in courts and Supreme Court's intention therein. 'Judges of this

Court cannot be dragged into a controversy as to whether the statements ascribed to them (during the course of argument) are correct or express correctly and fully what they had in view. Judges cannot be drawn into controversy over such matters. To permit the atmosphere of the Court to be vitiated by such controversy would be detrimental to the very foundations of the administration of justice. What may have been said or expressed may often enough be in the course of tentative loud thinking and may reflect only very partially what the judges had in view. What ultimately weighs with the judges in pronouncing the order may often be reflected in the orders (when reasons are given).'[15]

It was still more unfortunate that the Court thought it necessary to proclaim, "We think it right to say that what we have said above has not in any way weighed with us in our consideration of the review application which we have dismissed as above stated without giving reasons as before."[16] One only hopes this would not encourage similar applications from other disappointed parties. The admission of the review application on such a ground may or may not imply the disapproval of the conduct of the justice concerned by his brethren on the bench. One wonders whether the interruptions from the Bench in this were any the more extensive or more irritating than is usual.[17] Or was it that the advocate concerned was more sensitive than his brethren-at-law who had been similarly dealt with? Of course, the irritation of the advocate at bar may have arisen from the fact that he was either not well prepared or trying to reopen matters which had stood decided already and which the bench in question was not prepared to reopen.

It is surprising that the earlier practice of convening a full court to hear a case which involved upsetting a previous decision openly was not followed, as for example, in the State of U.P. v. Manbodhan Lal.[18] Now that there are eleven judges of the Court, it should not be allowed to be said that the decision in a particular case probably turned on the composition of the bench. Even if there were no truth in such an assertion, it would be unfortunate for the reputation of the Supreme Court and for continual lodging in it of the power of the judicial review. The interpretation of the Constitution by the Court when it upsets a previous decision, should be—to be validly accepted—the interpretation by the entire Court. Chief Justice Mahajan had referred certain such cases to seven judges and some even to the entire Court of eight judges. Chief Justice Mukherjee had referred the Bengal Immunity Co. case[19] to the entire Court consisting of seven judges (the eighth member, the Chief Justice, was ill). Of course, the Constitution allows the Supreme Court to hear a case involving an interpretation of the constitution by a bench consisting of not less than five judges.[20] It is necessary to remember, however, that acquiscence in the decisions of the Supreme Court does not entirely arise out of the power of

judicial review lodged in it by the Constitution. To a large extent the eventual exercise of this power depends upon the acceptance of its decisions by the people at large.

A foreign critic[21] of the Supreme Court has complained recently that on account of some of its interpretation of the Constitution having been upset by amendments thereof, the Supreme Court is now reluctant to show the same courage it once did in declaring invalid executive action or legislative enactment. This would be unfortunate, if true. To a layman at least two of the recent decisions apparently seem to indicate a withdrawal by the Supreme Court from its overseeing position. When in Narendra v. the State of Punjab[22] it sustained the action of the Punjab Government in banning publication of news or comments about a specified subject in a newspaper in the interest of public order—because the legislature had authorised it to do so in its discretion—without itself holding whether in the circumstances of the instant case such a restriction on a fundamental right of citizens was a reasonable restriction, it seemed to withdraw from a very large field apparently entrusted to its care. If, as it said in the case, 'the Surpreme Court is wholly unsuited to determine the time or the extent to which restrictions on press should be imposed' and if 'to make the exercise of (this) power justiciable will defeat the very purpose for which the power is given,' it seems to follow that it may hold so in other cases as well. This would certainly be an unfortunate development leading to the emergence of political questions in a form in which they do not exist even in the United States?[23] Or is the Supreme Court adopting the American doctrine of respecting the determination of such questions by the State legislature that seems to paralyse the judicial functioning of some of the American judges today?[24] If it is, it has no excuse here. The State constitutions in India are a part of the Constitution of India. There are no independent courts in the States, independent from the judicial control of the Supreme Court. One hopes, however, that neither of these inferences is justifiable. If it were the Supreme Court would be justifying—without having any valid reason to do so—the criticism of these who have been asserting in the United States that no Court can protect a society.[25] Some English critics of the Indian Constitution also would feel justified in their assertion that fundamental rights in a Constitution cannot be protected.[26] This would be catastrophic. Unlike the Constitution of the United States, the Indian Constitution lays down the restraints that can be imposed on fundamental rights and does not leave their determination to the Court. Unlike most continental constitutions the Indian Constitution does make provision for protecting the citizens in the enjoyment of their fundamental rights.

In the State of U. P. v. Manbodhan Lal[27] the Supreme Court had to interpret Article 320 (3) (c). The Supreme Court held that Chapter II containing article 320 'does not in terms confer

any rights or privileges on an individual public servant nor any constitutional guarantee of the nature contained in chapter I of that part, particularly Article 311.' It further held that 'the Constitution does not, either in express terms or by implication, provide that the result of non-compliance with the requirement of article 320 (3) (c) is to invalidate the proceedings ending with the final order of the Government.' The Supreme Court could not get away from the language of the article 320 where the word "shall" is so often used and conceded that its "use in a statute is generally taken in the mandatory sense", but argued that "its use does not necessarily mean that unless the words of the statutes are punctiliously followed, the proceeding or the outcome of the proceedings would be invalid." Earlier in P. Joseph John v. State of Travancore Cochin,[28] the Supreme Court had held clauses (1) and (2) of article 166 directory. It had however asserted that "in order to determine whether there is compliance with these provisions all that is necessary to be seen is whether there has been any substantial compliance with them." In the instant case, where the Supreme Court held provisions of article 320 (3) (c) directory only, the Supreme Court did not stop to find that there had been any substantial compliance with the provisions of the Constitution. It conceded that 'there had been an irregularity in, though not the complete absence of, consultation with the Public Service Commission.' It found that there was no consultation with the Commission after the respondent had submitted his explanation in answer to the second—and the only valid—show cause notice proposing punishment. Therefore there was not even substantial compliance with the directory rules. In deciding the question of costs, the Supreme Court concedes that 'the appellants did not strictly comply with the terms of article 329 (3) (c).' If compliance, strict or substantial, with the terms of article 320 (3) (c) is not obligatory, it should not have been necessary to bring this failure up or on this account to 'order each party to bear its own cost throughout.'

The Supreme Court also failed to notice that it was interpreting not a statute but a Constitution. It seemed to rely on Montreal Street Railway Co. v. Normandin.[29] But it was straining the observations of the Judicial Committee beyond what they seemed to have implied. For one thing, the Privy Council was interpreting a statute, not a Constitution. The Privy Council in its judgment as cited by the Supreme Court, had said, 'when the provision of a statute would not *promote the main object of the legislature*, it has been the practice to hold such provisions to be directory only, the neglect of them though punishable, not affecting the validity of acts done.' The Supreme Court made no attempt to prove that the performance of the duty by the executive as laid down under article 320 (3) (c), would not promote the main object of the legislature, nor did it try to follow the Privy Council in holding that the neglect of these provisions was punishable as the Privy Council

had implied in the case cited above. It is surprising that the Supreme Court claimed to rely on the judgment of the Privy Council without actually doing so. The judgment of the Privy Council went on to say that when a statute prescribes *a formality* for the performance of a public duty, the *formality* is to be regarded as directory only if to hold it mandatory would cause serious general inconvenience or injustice.[30] It is strange that the Supreme Court did not cite this portion of the judgment where the Privy Council makes it clear that its judgment is confined to 'formality' alone causing general inconvenience or injustice. The provisions of article 320 (3) are not a formality and were not intended to be so.

The Supreme Court seems to seek support for its decision in Bisvanath Khemka v. the King Emperor[31]—decided by the Federal Court—in that though "the words of the section the Federal Court was interpreting were very emphatic and of a prohibitory nature", the Federal Court "repelled the contention that the provisions of the section were mandatory". It forgot that whereas the Federal Court was interpreting a statute, the Supreme Court had to interpret the Constitution. Furthermore in the instant case it was claimed—and held so by the High Court—that non-observance of the provisions in the Constitution in his case had adversely affected the appellant in Court. This was not so in the case decided by the Federal Court and relied upon by the Supreme Court.

It is surprising to find the Supreme Court suggesting that 'once relevant regulations have been made by the executive, they are meant to be followed in letter and in spirit',[32] and yet holding that provisions in the Constitution need not be so followed. One fails to see why delegated legislation should be held to be of greater force than the very provisions of the Constitution under which the regulations are to be made.

The proviso to article 320 (3) only makes it possible for the Governments concerned to take specified appointments from out of the purview of the Public Service Commission. But to argue from this, as the Supreme Court seems to do, that till they do so, the Governments need not consult the Public Service Commissions about any appointment is, to vary the phraseology of the Supreme Court with regard to fundamental rights and restraints thereon, to make the exceptions more important than the rule.

The Supreme Court exaggerates the ill effects of holding clause (3) (c) of article 320 mandatory. If the dismissal of Manbodhan Lal by the Government of U.P. had been held invalid, as it should have been, no one would have been seriously affected. In rare cases, where governments may not have consulted the Public Service Commissions justice may have required the reinstatement of some of the public servants.

To argue that, 'if provisions of article 320 (3) (c) and (b) are held mandatory, an appointment made to public services of the Union or a State without observing strictly the terms of these sub-clauses

would be adversely affected without any fault on the part of the civil servant appointed thereto and without his having a say in the matter'[33] is besides the point. It is ridiculous to claim, as the Supreme Court seems to do, that by taking away the safeguard of the Government's being compelled to consult the Public Service Commission in actions to be taken against the public servants, the Supreme Court is acting either in the interests of the civil servants or of justice.

The Supreme Court has tried to brush aside guarantees to public servants by declaring that 'article 320 (3) (c) of the Constitution does not confer any rights on a public servant'.[34] When a course of action is prescribed by Constitution and not by a statute, it is difficult to see how a departure from a substantial, though not punctilious, compliance with it does not afford a cause of action. If a statutory authority does not act in the prescribed way, it can certainly be directed to do so. By holding to the contrary in this case, where a course of action has been prescribed for the executive by the Constitution, the Supreme Court has reduced the Public Service Commission to the status of less than a statutory body. It has destroyed some of its vital functions by holding, as in this case, that the executive need not act on articles 320 (3), as no evil consequences are likely to follow,[35] not even punishment for its non-observance.

Another disturbing tendency in some of the recent cases lies in the Supreme Court's granting wider powers to the Government than it seemed to demand. When the State of Assam accepted the decision of the Assam High Court that it had no right to cancel a fisheries lease properly awarded—as the Supreme Court had held earlier in State of Assam v. Keshav Prasad Singh[36]—and did not appeal, the Supreme Court, reversing the earlier decision, held that the Government could validly terminate such a lease.[37] In K. S. Srinivasan v. Union of India it transpired[38]—as the dissenting judgment of Justice Bose clearly brings out[39]—that though the Union Government was prepared to give semi-permanent status to Srinivasan, the Supreme Court upheld the objection of the Union Public Service Commission against the conferment of that status on the appellant.[40]

NOTES

1 The Bengal Immunity Co. v. The State of Bihar, 1955 II S.C.R. 603.

2 Cf. for example Collector of Malabar and another v. Errimal Ebrahim Hajee, A.I R. 1957 S.C. 668; Workers D.T.E. v. Management D.T.E., A I.R. 1958 S.C. 35; Pannalal Binjraj v. Union of India, 1957 S C R. 233; Khushal Rao v. State of Bombay, A.I.R. 1958 S.C. 25; Ganga Ram Das v. The Tezpur Kaibarta Co-operative Fisheries Society and others, A.I.R. 1957 S.C. 377.

3 See Note 2.

4 See Note 2. The Supreme Court judgment here frankly declared that

'the decision of this court in the State of Assam v. Keshav Prashad Singh (1953 S.C.R. 865) was clearly wrong and cannot be supported.'

5 Bhikaji Narain Dhakras v. The State of M.P., 1955 II S.C.R. 589.
6 Saghir Ahmad v. State of Uttar Pradesh, 1955 I S.C.R. 707.
7 Amar Singh v. The Custodian of Evacuee Property, A.I.R. 1957 S.C. 600.
8 State of West Bengal v. Subodh Gopal Bose, 1954 S.C.R. 587.
9 Kathi Raning Rawat v. The State of Saurashtra, 1952 S.C.R. 435.
10 Dwarkadas Srinivas v. Sholapur Spinning and Weaving Mills Co., 1954 S.C.R. 674.
11 State of Bihar v. Ram Naresh Pandey, A.I.R. 1957 S.C. 389.
12 Manak Lal v. Prem Nath Sanghvi, A.I.R. 1957 S.C. 425.
13 State of U.P. v. Manbodhan Lal, A.I.R. 1957 S.C. 912.
14 Messrs Associated Tubewells Ltd., v. R.B.Gujar Mal, A.I.R. 1957 S.C.742.
15 Ibid. 742.
16 Ibid. 743.
17 Justice Vivian Bose on page 3 of 1955 II S.C.R.
18 S. R. Das, C. J., Venkatarama Aiyar, Sinha, Kapur and Sarkar J.J., heard the case.
19 Cf. above note 1.
20 Article 145(3).
21 Gledhill in *Public Law*, Summer 1958, page 114.
22 Narendra v. The State of Punjab, A.I.R 1957 S.C. 896.
23 Cf. The Constitution of the United State—annotated and edited by Corwin, pages 546 to 549.
24 Cf. *Essays in Constitutional Law* Edited by McClosky; *Nine Men* by Fred Rodell; *Vinson Court* by Prichet.
25 Cf. Justice Learned Hand, *Spirit of Liberty* p. 164. It is necessary to remember that civil liberties cases started reching the Supreme Court only in 1958.
26 *Some Characteristics of the Indian Constitution*—Jennings.
27 The State of U.P. v. Manbodhan Lal, A.I.R. 1957 S.C. 389.
The bench that decided this case consisted of Chief Justice S. R. Das and Justices Venkatarama Aiyar, Sinha, Kapur and Sarkar. Of these, the Chief Justice and Venkatarama Aiyar had participated in the unanimous decision given in P. Joseph John v. State of Travancore Cochin cited above in note 2. The Court had then consisted of Chief Justice Mehr Chand Mahajan, Justice Mukherji, Justice S. R. Das, Justice Venkatarama Aiyar, Justice Vivian Bose; Justice Jagannadhadas. When the case was decided by the five justices named above the full court had justices Bhagavati, Jagannadhadas, Imam, S. K. Das, Gajendragadkar and K. Subba Rao on the bench besides the five justices named earlier.
28 1955 I S.C.R. 1101.
29 1917 A.C. 170.
30 Ibid. 173.
31 1945 F.C.R. 99.
32 A.I.R. 1957 S.C. 389.
33 Ibid.
34 Ibid.

35 Ibid.

36 State of Assam v. Keshav Prashad Singh, 1953 S.C.R. 865.

37 Ganga Ram v. The Tezpur Kaibarta Fisheries Co-operative Society and others, A.I.R., 1957 S.C. 377.

38 K. S. Srinivasan v. Union of India, A.I.R., 1958 S.C. 430.

39 Justice Bose in K. S. Srinivasan v. Union of India, A.I.R., 1958 S.C. 434.

40 K. S. Srinivasan v. Union of India, A.I R. 1958 S.C. 430.

On 18 February 1958 Chief Justice S. R. Das and Justice T. I. Venkatarama Aiyar, S. K. Das, A. K. Sarkar delivered the majority judgment of the Court with justice Vivian Bose dissenting and held that even though the Union Government had conferred the semi-permanent status on K. S. Srinivasan on 14 December 1953, this was not a valid order as the Public Service Commission had objected to his appointment as Assistant Station Director as not being according to the regulations. The regulations required that no order shall be issued conferring such a status in that particular post except after consultation with the Public Service Commission. The Court rather ingeniously argues that 'though article 320 in its present form may not be mandatory as against the President, the regulation is against the appointing authority'. It rather conveniently ignores the patent fact that all such appointments are made by the President and the particular appointing authority is, under the rules of business, only the vehicle for notifying the decision of the President.

Justice Vivian Bose in his dissent (A.I.R., 1958 S.C. at 432) contrasts this attitude of the Court with its previous attitude in Manbodhan Lal's case. "The essence of prohibition in the regulations against conferring the status lies in the words' 'is required to be made'. Just what do these words mean? 'I have no doubt that in the ordinary way these words should be construed to mean what they say. But so, I would have thought at first blush, do the words in article 320(3) of the Constitution. They are equally emphatic. They are equally imperative. But this Court held in A.I.R. 1957 S.C. 912 that they do not mean what they seem to say and that they are directory only and not mandatory'.

'Government would not have acted in this way, if they had realized that they were under a directive duty of the Constitution to consult the Union Public Service Commission first'. Justice Bose in dissent in K. S. Srinivasan v. Union of India, A.I.R. 1958 at 434.

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